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FILED
10-475 OCT 8 - 2010
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No.

IN THE
Supreme Court of the United States

MAHENDER MURLIDHAR SABHNANI,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was charged with specific-intent crimes arising from his wife's alleged scheme to hold two immigrant domestic workers in involuntary servitude. The government's primary theory was that petitioner aided and abetted his wife by failing to act: *i.e.*, he knew what his wife was doing but did not stop her. The district court gave an aiding-and-abetting instruction, over petitioner's objection, stating that willful participation in the principal's criminal scheme could be satisfied, "in the case of failure to act, [by] the specific intent to fail to do something that the law requires to be done."

In affirming, the Second Circuit found the government's failure-to-act theory for aiding and abetting "dubious," but declined to decide whether it was lawful for the jury to convict petitioner under it. The court instead found that the challenged instruction was not likely to have led the jury to convict for failure to act, but did so without engaging in the harmless-error analysis required under *Neder v. United States*, 527 U.S. 1 (1999), *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam), and *Skilling v. United States*, 130 S. Ct. 2896 (2010).

The questions presented are:

1. Whether a reviewing court may rule out the risk of prejudicial error from an aiding-and-abetting instruction that includes a legally erroneous ground for conviction without engaging in the harmless-error analysis required under *Neder*, *Hedgpeth*, and *Skilling*.

2. Whether a defendant may be found guilty of aiding and abetting under 18 U.S.C. § 2 for failure to act where no law establishes a duty to act.

PARTIES TO THE PROCEEDING

Petitioner is Mahender Murlidhar Sabhnani, a defendant-appellant below. Varsha Mahender Sabhnani was also a defendant-appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mahender Murlidhar Sabhnani petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 599 F.3d 215 (Pet. App. 1a). The opinion of the district court is published at 539 F. Supp. 2d 617 (Pet. App. 88a).

JURISDICTION

The court of appeals filed its opinion on March 25, 2010, and denied rehearing on May 12, 2010. Pet. App. 118a. On July 16, 2010, JUSTICE GINSBURG granted an extension of time to file a petition for certiorari to October 11, 2010. No. 10A67. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2 provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

The government, armed with a supporting jury instruction, urged the jury in summation to convict petitioner on a theory of criminal liability overwhelmingly rejected by federal courts: that a defendant is guilty as an aider and abettor under 18 U.S.C. § 2(a) for failing to stop the criminal conduct of another. Decades of jurisprudence in this Court and the courts of appeals hold that, in the absence of a legally required duty to act, an essential element of aiding and abetting is that the defendant participate in the crime through an "affirmative act." Yet when reviewing petitioner's convictions in a trial in which failure to act was not only one of the government's two theories for conviction, but its *principal* theory, the Second Circuit refused to conduct the harmless-error analysis required by this Court's precedents. Instead, it devised a halfway approach in which it found no prejudice from instructing on failure-to-act liability solely by looking to the challenged aiding-and-abetting instruction—rather than the entire trial record—and without placing the burden to disprove prejudice on the government. The Second Circuit's erroneous method of harmless-error review warrants this Court's review, particularly in light of the far-reaching implications of the government's overly broad aiding-and-abetting theory.

1. Between 2002 and 2007, petitioner and his wife, Varsha Sabhnani, immigrants from India and Indonesia respectively, employed two Indonesian domestic workers, Samirah and Enung, in their home in Syosset, New York. Pet. App. 4a–5a. Samirah arrived in the United States and began work in February 2002, and Enung in January 2005. *Id.* at 5a, 11a. Petitioner's interaction with Samirah

and Enung was minimal. He did not speak Indonesian, and they did not speak English. Trial Tr. 2370, 3488. Varsha, who did speak Indonesian, oversaw the household while petitioner ran the family business, a successful perfume export operation, from an office adjacent to the home.

Samirah left the residence on the evening of May 12, 2007, and told police the following day that Varsha had physically abused her. Pet. App. 16a. The next day, the police arrested petitioner and his wife, and they were indicted on charges of forced labor (18 U.S.C. § 1589(a)), harboring aliens (8 U.S.C. § 1324(a)(1)(A)(iii)), peonage (18 U.S.C. § 1581(a)) and document servitude (*id.* § 1592(a)), as well as conspiracy counts for each of the four substantive offenses. Pet. App. 18a–19a; D.E. 182 (E.D.N.Y. Sept. 18, 2007). According to the government, the Sabhnanis had conspired to employ the women for years without paying them directly and to prevent them from returning to Indonesia. The government identified a number of overt acts that allegedly furthered the conspiracy, but nearly all were attributed to Varsha alone. D.E. 182, at 2–6, 9–18. The government alleged, for example, that Varsha had physically abused the women, prevented them from leaving the residence, confiscated their passports, and made them perform work without direct compensation.[1] The only "acts" that the indictment at-

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[1] Samirah's payment, which went to her daughter Lita in Indonesia, was an initial $1 million rupiah and then $100 per month (the equivalent of $1 million rupiah between 2002 and 2007). Trial Tr. 1369–70, 2508, 2511. Although the government relied on these amounts to assert that Samirah must have stayed involuntarily, the payment made to Lita was in line with

tributed to petitioner were accompanying Varsha and others when they picked each of the two women up at the airport upon their arrivals in the United States; having joint access to the locked closet in which Varsha stored the women's passports along with the Sabhnanis' own immigration documents; and joining Varsha in looking for Samirah on May 13, 2007 after she left without telling the Sabhnanis. *See id.*

At trial, the government presented graphic testimony from the women about Varsha's purported mistreatment of them by, for example, cutting Samirah's face and chest with a knife, forcing Samirah to eat her own vomit, and inflicting numerous other punishments for minor transgressions. *See* Trial Tr. 1765, 1769, 1876–77.

The government's evidence against petitioner paled in comparison. According to the testimony of *both* Samirah and Enung, not only was petitioner never present for the abusive behavior, Varsha took active steps to conceal her conduct from him. For example, Enung testified that "the Mister didn't know" about Varsha's alleged threats to kill the women. Trial Tr. 3576. Indeed, the few acts that the government even tried to attribute to petitioner were of weak probative value at best: *e.g.*, instructing Samirah on occasion to complete her household chores (*id.* at 1768); telling his wife that Samirah had fallen asleep while cleaning and (on another occasion) that she was eating food from a garbage receptacle (*id.* at 1848); and turning down a gardener's

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[Footnote continued from previous page]

Indonesian wages; for example, Lita's husband made $2 million rupiah per month as an attorney. Trial Tr. 2593–94.

offer to help the women carry a heavy statue (*id.* at 3650–54). The government did not allege, because nothing would have supported it, that petitioner ever laid a hand on either woman or that he restrained them from leaving.

Given that the most the government could hope to establish was that petitioner *knew* about the mistreatment, it built its case against him on the proposition that his failure to intervene made him liable for aiding and abetting his wife under 18 U.S.C. § 2. That statute punishes as a principal "[w]hoever . . . aids, abets, counsels, commands, induces or procures [an offense's] commission." The government's view was that "aiding and abetting may be predicated upon a failure to act" even without an established duty to act, and that in any event the common law and the statutes under which petitioner was charged imposed a duty to stop another's alleged mistreatment of third parties. Pet. App. 158a–67a.

To that end, the government proposed an aiding-and-abetting instruction that, in pertinent part, stated: "Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of failure to act, with the specific intent to fail to do something the law requires to be done." D.E. 255, at 81 (E.D.N.Y. Dec. 1, 2007). Petitioner objected at the charge conference to this instruction that allowed him to be convicted for failing to act. Pet. App. 121a–22a. But the trial judge ruled that he would "leave it in" because "if it is a proper thing, and you don't do it . . . [i]t's a violation of the law." *Id.* at 121a. Defense counsel argued that such an instruction is appropriate only "where the law imposes an affirmative duty on the defendants to do something and there's a failure to act," such as the duty to pay taxes, and pointed out that no such duty was alleged here:

"[W]e don't have an offense here which charges a crime of failure to do something." *Id.* at 121a–22a. The trial judge disagreed:

> Sure we do. We have a load of them to stop what is going on in there, if you take what the government says is [sic] true. This man stayed there and let, for five years, these beatings, deprivation, lack of food, sleeping on the floor, wearing tattered gowns, hit with a stick. He failed to do anything. No, I'm leaving it in.

Id. at 122a.

The judge therefore read the failure-to-act instruction to the jurors (twice), informing them that willful participation as an aider or abettor included "a failure to act with the specific intent to fail to do something the law requires to be done." Pet. App. 134a; *see also* Trial Tr. 5076. Under this objected-to instruction, the jury had no need to concern itself with any limits to what the law might have required petitioner to do, because under the government's view of things the existence of a legal duty to act was "not an issue that would be presented to the jury for resolution." Pet. App. 154a.

The government took full advantage of the requested instruction in closing argument, urging the jury to convict petitioner for his supposed failure to stop Varsha from abusing the women. The government readily conceded that petitioner "didn't beat them," instead urging the jury to "[a]sk yourselves this, ladies and gentlemen: Who is worse? The twisted soul who tortures the maid, or the man of the house who lets it happen?" Pet. App. 124a. The summation repeatedly stressed petitioner's failure to

act in the face of what the government contended was his knowledge of unlawful actions. Petitioner "saw [Samirah] in rags, saw her in the wet clothing, saw the hats [that she wore]," the prosecutor told the jury, but "[h]e didn't do anything. He saw her sleeping in the basement bathroom. He didn't do anything." *Id.* at 128a. Likewise, "[h]e witnessed the punishment of Enung for the chocolates [that she had eaten]. . . . She was forced to stand for hours. What did he do? He laughed." *Id.* at 129a. The list of things petitioner *didn't* do continued:

- "He didn't take Samirah to the doctor, even though he saw her face that looked like that." *Id.*
- "He would see her swollen hands, her missing teeth. He saw this and he did nothing." *Id.*
- "[W]hen she left his house on Mother's Day for hours and hours, he didn't call the police." *Id.*

Quoting from the failure-to-act instruction, the government explained that "under the law Mahender is responsible for each and every action of his wife" because "[y]ou don't have to have actually committed the crime to be an aider and abettor." Pet. App. 126a. "All that needs to be established," the government said, cementing the omissions theory in the jurors' minds, "is that somebody else committed the crime, and that you knowingly and willfully associated yourself with that other person in some way to help with the crime. Help with the crime. And that can be done by action, *or it can be done by a failure to act*." *Id.* (emphasis added).

The jury convicted both petitioner and Varsha of all counts. Pet. App. 97a. The jury found, as reflected on a special-verdict form, that the government failed to prove that petitioner "caused a 'seri-

ous bodily injury'" to Samirah or Enung or engaged in "abuse or threatened abuse of the law or the legal process." D.E. 481-5, at 2, 4–7 (E.D.N.Y. Dec. 18, 2007).[2]

Petitioner moved for post-verdict acquittals, arguing again that aiding-and-abetting liability could not be predicated on a failure to act in the absence of an established duty to act, and that "the Jury was essentially invited to postulate any 'legal duty' it thought appropriate under the circumstances." D.E. 288-1, at 20–24 (E.D.N.Y. Jan. 21, 2008). The trial judge denied the motion. He again held that the jury was allowed to convict petitioner for failing to act, citing statements in a number of Second Circuit decisions that "'to prove a defendant guilty of aiding and abetting, the government must . . . prove . . . that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime.'" Pet. App. 115a (quoting *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999) (ellipses in original)). In the alternative, the judge concluded that "there was sufficient evidence at the trial to prove that Mahender affirmatively acted with the specific intent to advance the crimes." *Id.* at 116a. In other words, as the judge himself put it, "this is *not only* a failure to act case." *Id.* (emphasis added).

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[2] Consistent with the government's failure-to-act theory, the jury found that petitioner had "obtained the labor or services" of the women "through threats of serious harm or physical restraint"—all of which the testimony attributed to Varsha—and likewise "a scheme, plan or pattern intended to cause [the women] to believe that non-performance would result in serious harm." D.E. 481-5,. at 2–4.

At the sentencing hearing, the government continued to emphasize petitioner's failure to act in the face of inferred knowledge of his wife's conduct: "He had to know what was going on under his roof." Sentencing Tr. 33 (June 27, 2008). In pronouncing sentence, the judge also focused yet again on the government's failure-to-act theory for conviction. The "role of Mahender," he said, "is not as clear, certainly as Varsha Sabhnani, who was . . . the active participant in these cruel acts." *Id.* at 37. He "had to see some of what was going on by Varsha," and "so the jury found that he aided and abetted in these crimes, though *he was not a participant at all*." Pet. App. 137a (emphasis added). Although Samirah and Enung "testified that Mahender was not present when many of these cruel things occurred," a "reasonable jury could believe that he had to see, hear, and know about the many abuses of his wife." *Id.* at 138a–39a. The "main consideration in mitigation," the judge said, was that petitioner "never participated virtually in nothing. He participated in almost none of the acts, except maybe the passport." *Id.* at 142a.[3] "But [he] was there, saw, heard, and did nothing." *Id.* The judge sentenced Mahender to 40 months in prison. *Id.* at 3a.[4]

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[3] This solitary affirmative act to which the judge was able to point consisted of no more than petitioner's awareness that Samirah's and Enung's passports were safely stored in the same large cabinet that Varsha and petitioner used to store their own immigration documents.

[4] The judge also imposed an order of restitution in the amount of $936,546.22, a fine of $12,500, and forfeiture of petitioner's house (including the office for his family business). Varsha's prison sentence was 132 months. Pet. App. 3a.

2. Petitioner sought bail pending appeal. He pointed out that his appeal would raise the "significant" issue of whether aiding-and-abetting liability could be premised on a failure to act in the absence of an established legal duty. Motion, at 6 (2d Cir. Oct. 28, 2008). The district court denied the motion, but a panel of the Second Circuit reversed. *See* Order (2d Cir. Nov. 18, 2008) (joined by Sotomayor, J.).

At the hearing on the motion, the panel emphasized that the government's failure-to-act theory played a significant role in the appeal. *See* Pet. App. 151a (Judge Sotomayor: "[T]he question is why a charge indicating that the jury had to find a duty of some sort wasn't appropriate."); *id.* at 153a (Judge Sotomayor: "[A]ssuming that you are correct, that there is a duty here, isn't that still an element that must be charged to the jury for it to find, that the circumstances were, as you said, ones that created a duty?"). The government responded that the existence of a legal duty to act is "a matter of law and not an issue that would be presented to the jury for resolution." *Id.*

3. In its appeal brief on the merits, the government continued to defend petitioner's conviction under the failure-to-act instruction. It argued again that the jury did not need to be instructed on the source or contours of a legal duty to act, and contended that the court could divine such a duty from the common law or the statutes under which petitioner was charged. *See* Pet. App. 159a–66a. In the alternative, the government expressed doubt that the instruction led the jury to convict under the government's principal theory of failure to act, readily conceding, however, that "the parties and the district court interpreted the charge in this manner." *Id.* at 158a n.15.

Another panel of the Second Circuit affirmed petitioner's conviction. *See* Pet. App. 1a–87a. The court began by explaining that the failure-to-act theory of liability on which the parties had tried the case, and which the trial judge endorsed at the jury charge conference, was probably legally invalid. *Id.* at 31a–34a. "[W]e find dubious," the court wrote, "the government's claims that aiding and abetting liability may generally be predicated upon a failure to act unconnected to any legal duty to do so, that the statutes at issue created an affirmative duty to act, or that Mahender Sabhnani was properly found by the jury to have violated a common law duty that required him to act." *Id.* at 31a–32a.

But the panel stopped short of deciding whether petitioner's conviction could be upheld on that theory. Instead, it engaged in a truncated analysis of the potential prejudice from the instruction, concluding—based solely on the aiding-and-abetting instruction itself—that it was unlikely that the jury's verdict rested on the failure-to-act instruction. "We need not decide the question whether in the circumstances of this case Mahender Sabhnani could properly be convicted based upon an omission to act, . . . because we reject his claim that the district court's instruction on willfulness, considered in the context of the aiding and abetting instruction as a whole, rendered the instructions so confusing as to permit the jury to convict him on this basis." Pet. App. 34a. The "failure to act" portion of the willfulness instruction, which had been "[d]rawn nearly verbatim from the model jury instruction in the leading treatise on the subject," was, in the view of the court, "simply extraneous to this case—at least absent further instruction as to a legal theory that would support liability based on a failure to act." *Id.* By the court's

lights, then, the legal error of giving an instruction that spared the jury of any need to find an essential element of failure-to-act aiding and abetting—*i.e.*, to find that the facts triggered a legal duty to act—minimized rather than *aggravated* the instructional error. *Cf. United States v. Gaudin*, 515 U.S. 506, 512 (1995) (holding that the government's view that a jury finds only "the factual components of the essential elements" and does not apply a "legal standard" to "historical facts" "has absolutely no historical support").

Petitioner had pointed out that failure to act—he "didn't do anything"—was the government's main theory of the case, and that the court of appeals should take into account the fact that the parties and trial judge all understood that this was the principal focus of the prosecution. But the Second Circuit refused even to consider these factors in its analysis of potential prejudice. As for the trial judge's conclusion that petitioner could be convicted for failure to act—*i.e.*, despite the fact that petitioner "was not a participant at all"—the court of appeals instead focused on the judge's alternative ruling that there was also minimally sufficient evidence for a jury to convict based on affirmative acts. Pet. App. 37a. The Second Circuit simply deemed it *irrelevant* as a matter of law that the government relied throughout trial on a failure-to-act theory or that the judge overruled defense objections to the jury instructions so that the jury could have that theory available to it. The court reasoned that although "a party's summation can heighten the *already present risk* that an erroneous jury instruction may mislead the jury," it could not be considered at all in assessing whether the jury might have convicted on the ground that the government urged. *Id.* at 38a (emphasis in original).

In refusing to take account of anything beyond the four corners of the aiding-and-abetting charge, the panel never reached the stage at which *the government* bears the burden of disproving prejudice beyond a reasonable doubt.

Petitioner raised the instructional issue again in his petition for rehearing *en banc*, pointing out that the panel had "skirted the issue" of failure-to-act liability under Section 2. Pet'n for Reh'g, at 4 (2d Cir. Apr. 7, 2010). The Second Circuit denied rehearing. Pet. App. 118a–19a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S ANALYSIS OF INSTRUCTIONAL ERROR DIVERGES SHARPLY FROM THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS

For decades this Court has recognized that giving the jury the option to convict for something that is not, or cannot be made, a crime is constitutional error. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Yates v. United States*, 354 U.S. 298, 311–12 (1957); *Bachellar v. Maryland*, 397 U.S. 564, 570–71 (1970). Two Terms ago, this Court held for the first time that these sorts of "*Yates*" errors are subject to harmless-error analysis. *See Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008). Under such analysis, the government bears the burden to establish harmlessness, and its burden is substantial. Reversal is *required* "if 'there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The Second Circuit's new approach to instructional challenges departs sharply from this Court's harmless-error standard. While the lower court rec-

ognized that the failure-to-act instruction was premised on a "dubious" legal theory and carried a risk of misleading the jury on the proper elements of aiding and abetting, it nonetheless reached its conclusion that the instruction did not prejudice petitioner without any consideration of the prejudicial effect of the trial arguments and evidence. That mode of analysis relieved the government of *its* burden to prove beyond a reasonable doubt that the instruction did not prejudice petitioner. Such a diluted form of harmless-error review cannot be reconciled with the well-settled precedents of this Court and other circuits.

The end result of the Second Circuit's flawed analysis was to insulate from review the government's sharp departure from what has long been the settled rule for the elements of aiding and abetting: that without an established legal duty to take certain actions the government must prove that the defendant affirmatively acted to bring about a desired illicit result. Indeed, the government confidently proclaimed throughout these proceedings—right through briefing in the Second Circuit—that petitioner could be convicted in the absence of any legal duty to act. The government's dramatic effort to expand aiding-and-abetting liability calls for serious judicial scrutiny, not the ersatz harmless-error analysis conducted here.

A. The Second Circuit's Decision Cannot Be Reconciled With This Court's Harmless-Error Precedents

1. This Court has repeatedly held that when a jury instruction may have led the jury to convict without finding every element of the offense beyond a reasonable doubt, the harmless-error standard of *Chapman v. California*, 386 U.S. 18 (1967), applies. *See Skilling v. United States*, 130 S. Ct. 2896, 2934 &

n.46 (2010); *Hedgpeth*, 129 S. Ct. at 532; *Neder v. United States*, 527 U.S. 1, 15 (1999). Nowhere is that requirement more important than in a general-verdict case where the jury is given multiple theories on which to convict and one of them is legally invalid. In such cases, a reviewing court must ask whether it "appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" with the burden resting firmly on the government. *Id.* at 15 (quoting *Chapman*, 386 U.S. at 24).

Harmless-error review requires a court to determine not only whether a flawed jury instruction, in the context of the instructions as a whole, could have misled the jury, but also to examine the trial record in its entirety to determine whether there is a "reasonable possibility" that the error "might have contributed to the conviction." *Yates*, 500 U.S. at 403 (internal quotation marks omitted). The conviction may be upheld only "if the reviewing court may confidently say, *on the whole record*, that the constitutional error was harmless beyond a reasonable doubt." *Neder*, 527 U.S. at 15–16 (emphasis added; internal quotation marks omitted); *see also id* at 19 ("[S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record."). Under *Chapman*, "the Government's opportunity and burden is to show the error harmless based on the entire record before the reviewing court." *United States v. Vonn*, 535 U.S. 55, 68 (2002).

For that reason, this Court has disallowed a mode of assessing the prejudice of a challenged instruction that looks solely at the instructions themselves. In *Pulido*, this Court, after holding that the Ninth Circuit had mistakenly classified instructional error as structural, rejected the dissent's view that the court of appeals had nevertheless alternatively

conducted a proper harmless-error review; the majority explained that the Ninth Circuit erred because it looked solely to the instructions rather than "the record as a whole." 129 S. Ct. at 533 n.*.

The Second Circuit radically diverged here from this established structure of harmless-error review.

The court began by recognizing the distinct possibility that the instruction on the failure-to-act theory had misled the jury. The Second Circuit in fact had no dispute with petitioner's contention that "the prosecutor's summation did misstate the applicable law," and it also recognized that the instruction "could [have] potentially confuse[d] the jury as to the applicable law." Pet. App. 34a, 38a.

The court could scarcely have concluded otherwise. As discussed further in Section I.B *infra*, this Court has long held that to establish aiding-and-abetting liability, "it is necessary that a defendant 'in some sort associate himself with the venture, that he *participate* in it as something that he wishes to bring about, that he seek *by his action* to make it succeed.'" *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (emphases added) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). The courts of appeals have likewise unanimously held that under this Court's definition of aiding and abetting, a defendant must "have aided the venture through *affirmative action*." *United States v. Summers*, 414 F.3d 1287, 1296 (10th Cir. 2005) (emphasis added).[5]

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[5] *Accord United States v. Medina-Román*, 376 F.3d 1, 4 (1st Cir. 2004); *United States v. Baldwin*, 347 F. App'x 911, 912 (4th Cir. 2009) (per curiam); *United States v. Lopez-Urbina*, 434 F.3d 750, 757 (5th Cir. 2005); *Wright v. United States*, 182 F.3d 458, 465 (6th Cir. 1999); *United States v. Allen*, 390 F.3d 944, 948 n.1 (7th Cir. 2004); *United States v. Hayes*, 574 F.3d 460, 476–77 (8th Cir. 2009); *Altamirano v. Gonzales*, 427 F.3d 586,

The "participation" requirement "means that the defendant engaged in some affirmative conduct designed to aid the venture." *United States v. Lopez-Urbina*, 434 F.3d 750, 757 (5th Cir. 2005) (internal quotation marks omitted).

The instructions in this case, however, gave the jury a second and much easier route to conviction. The court told the jury that "[p]articipation in a crime is willful if [1] action is taken voluntarily and intentionally *or* [2] *in the case of a failure to act* with the specific intent to *fail to do* something the law requires to be done." Pet. App. 134a (emphases added).

This failure-to-act option was far from inadvertent. The government maintained throughout the proceedings below, right up through its appellate brief, that it was "legally correct" for the trial court to have "permitted the jury to convict on an aiding and abetting theory based upon a failure to act." Pet. App. 158a. Moreover, the government urged, a defendant may be convicted of aiding and abetting based solely on omissions because there is a *free-standing duty to act* implicit in the law. *Id.* at 160a–61a.[6] For that same reason, the government never

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594 (9th Cir. 2005); *United States v. Wilson*, 160 F.3d 732, 738 (D.C. Cir. 1998).

[6] The government argued, in the alternative, that petitioner was properly convicted for failure to take required actions purportedly specified in each of the underlying substantive statutes charged here. Pet. App. 161a–62a. The Second Circuit correctly concluded, however, that "none of the statutes pursuant to which Mahender was convicted expressly impose an affirmative duty to take action." *Id.* at 30a. Nor could some vague "background common law" "duty to the maids" fill the void, the court explained, because even if one existed "the jury here was not charged on the nature of this duty nor instructed as to the factors it should consider in determining whether the duty was

tendered an instruction that *defined* the scope of the duty to act so that the jury could at least find—as it plainly needed to—whether the facts of this case triggered it. *See Gaudin*, 515 U.S. at 513 (holding that it is the "historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts"). Instead, the government's unwavering objective was to prod the jury into concluding that at some unspecified point the conditions had become such that an amorphous and subjective duty to act sprang from universal feelings of empathy and humanity.

Despite the unanimous weight of circuit precedent requiring, as this Court did in *Nye & Nissen*, that the defendant commit some affirmative act, the government pressed forward on its omission theory because it *had* to: It presented virtually no evidence of any "affirmative actions" that petitioner took in furtherance of the charged crimes. In the trial judge's words, petitioner "participated in almost none of the acts." Pet. App. 142a. The government fully recognized that it needed a failure-to-act instruction so that it could appeal to each juror's sense of moral obligation with the refrains that if you see a person "wearing these rags in your home, you know something is wrong" and "I guarantee you, you would do something about it." *Id.* at 127a. And, moreover, so it could argue that petitioner was "responsible for each and every action of his wife" because he knew

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discharged." *Id.* at 33a–34a. Thus, the government's primary theory for convicting petitioner would be valid only if it could be said without qualification that "aiding and abetting may be predicated upon a failure to act." *Id.* at 159a.

what was happening in his house and "didn't do anything" about it. *Id.* at 124a, 128a.

Faced with an instruction that permitted the jury to convict petitioner for a naked failure to act, the Second Circuit had three options: (1) hold that petitioner's failure to act was sufficient for aiding-and-abetting liability, creating a conflict between the Second Circuit and nearly every other court, including this one; (2) hold that even if affirmative acts were needed to convict, the instruction was harmless beyond a reasonable doubt because the record does not "contain[] evidence that could rationally lead to a contrary finding with respect to the [misstated] element" (*Neder*, 527 U.S. at 19); or (3) hold that petitioner could not lawfully be convicted under a failure-to-act theory and reverse because the government failed to establish beyond a reasonable doubt that the instruction had no improper effect on the verdict. The Second Circuit panel that granted petitioner bail clearly understood this: "The issue is whether an erroneous charge, if one existed, contributed to the verdict in some way." Pet. App. 151a (Sotomayor, J.).

But the merits panel chose none of the available options. Instead, it invented a novel fourth choice in which it strongly suggested (but refused to hold) that the government's theory was legally incorrect—"dubious," in the panel's words—but performed only a truncated harmless-error review that failed to consider the entire record and neglected to place the burden on the government to disprove prejudice.

That mode of legal analysis marks such a sharp break with the precedents of this Court that it demands review. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (per curiam) ("Because the Ninth Circuit's holding is in direct conflict with our precedents, we grant the petition for a writ of certio-

rari and reverse."). Despite this Court's repeated rulings that harmless-error review requires analysis of the entire record of a trial, *see supra*, the Second Circuit expressly refused to consider anything but one jury instruction. In particular, the court declined to consider the prejudicial effect that the prosecutor's summation would have had on a juror's understanding of what was required for conviction—a summation in which the government, armed with the judge's ruling at the charge conference, forcefully stressed that petitioner *could* be found guilty for a failure to act. *E.g.*, Pet. App. 38a ("All that needs to be established is that somebody else committed the crime, and that you knowingly and willfully associated yourself with that other person in some way to help with the crime. Help with the crime. And that can be done by action, *or it can be done by a failure to act.*" (government's summation) (emphasis added)). And the Second Circuit failed to place the burden on the government, as *Chapman* requires.

2. The Second Circuit cited this Court's decision in *Cupp v. Naughten*, 414 U.S. 141 (1973), for the rule that prejudice from a challenged instruction can be ruled out solely by looking at the instructions in isolation from the rest of the trial record. But *Cupp* supports precisely the opposite conclusion. This Court explained that in reviewing claims of instructional error a court must be cognizant that "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, arguments of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Id.* at 147. "Thus not only is the challenged instruction but one of many such instructions, *but the process of instruction itself is but one of several components of the trial . . . .*" *Id.* (emphasis added).

Just two years later, in *United States v. Park*, 421 U.S. 658 (1975), this Court reemphasized that

jury instruction challenges must be reviewed in the context of the entire trial. "[I]n reviewing jury instructions," the Court said, "our task is . . . to view the charge itself as part of the whole trial." *Id.* at 674. Only after reviewing the trial record and concluding that certain statements in the jury instructions would not have been misunderstood by the jury did the Court conclude that the conviction could stand. *Id.* at 675.

Other circuits have repeatedly emphasized what this Court explained in *Cupp* and *Park*: that a potentially prejudicial instruction must be evaluated in light of the entire trial record. Appellate "review of . . . challenged instructions considers the big picture, asking whether the charge in its entirety—*and in the context of the evidence*—presented the relevant issues to the jury fairly and adequately." *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 47 (1st Cir. 2004) (emphasis added). A court "looks at 'the entire charge in the context of the trial *including arguments made to the jury*.'" *United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994) (emphasis added) (quoting *United States v. Fotovich*, 885 F.2d 241, 242 (5th Cir. 1989)). Thus, "even a facially correct instruction may, *in the light of record proof*, the totality of the jury charges, *or other circumstances of the case,* be incomplete, misleading, confusing, or otherwise prejudicial." *United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004) (emphases added); *see also United States v. Ruiz*, 932 F.2d 1174, 1181 (7th Cir. 1991) (holding that a reviewing court must examine an alleged error "in the context of the instructions as a whole *and in light of the evidence adduced at trial*" (emphasis added)).

In line with these holdings, the First Circuit, when confronted with a challenge to the same aiding-and-abetting instruction, engaged in an analysis that cannot be reconciled with the Second Circuit's hold-

ing here. In *United States v. Bailey*, 405 F.3d 102 (1st Cir. 2005), a prison guard was convicted of aiding and abetting another guard's violation of an inmate's civil rights. As here, the jury received an aiding-and-abetting instruction that defined "willful" participation in the crime as "action [that] is taken voluntarily and intentionally, *or, in the case of a failure to act*, with the specific intent to fail to do something the law requires to be done." *Id.* at 110 (emphasis in original). The First Circuit reviewed only for plain error because the defendant—unlike petitioner—did not object to the instruction. *Id.*

Even under that more relaxed standard, the First Circuit looked beyond the jury instructions to determine whether it was likely that the failure-to-act portion of the charge led the jury to convict under that theory. "Because the government did not proceed on a failure-to-act theory," the First Circuit ultimately held, "the court's instruction on that point was extraneous." 405 F.3d at 110. The "government did not allege that Bailey merely stood by while his partner attacked the detainee," but rather "that Bailey struck the detainee himself, or, at a minimum, that he actively participated in his partner's assault." *Id.* Thus, only after concluding that the government had *not* pursued a failure-to-act theory against Bailey did the First Circuit deem the same challenged instruction—considered in context—extraneous to the verdicts. Here, by contrast, not only did the government vigorously pursue such a theory, the court informed defense counsel at the charge conference that he would need to argue petitioner's case in summation with "failure to act" as a fully sufficient basis for the jury to convict. *See United States v. Clay*, 495 F.2d 700, 707 (7th Cir. 1974) (agreeing with other circuits that the "obvious object" of Rule 30's requirement of a charge conference *before* closing arguments "is to require the judge

to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury.").

The Second Circuit departed from *Bailey* and a long line of unmistakable precedent in refusing even to consider the fact that everyone at the trial—the prosecutors, the defense attorneys *and* the trial judge—all understood full well that failure to act was the principal theory of prosecution and that this theory was fair game in closing argument. The court of appeals' newly minted version of harmless-error review—combining a half-baked error discussion with a severely curtailed prejudice analysis that shifts the burden away from the government—cannot be reconciled with this Court's clear guidance on how to review a *Yates* challenge.

3. This case is an ideal vehicle for reviewing the Second Circuit's misapplication of the harmless-error standard, because under the correct test petitioner's convictions must be reversed.

The gravamen of the government's case against petitioner was that he had a duty to take affirmative steps in response to his wife's conduct. Indeed, as the government portrayed it, petitioner's failure to act made him *more* culpable than the principal. Pet. App. 124a (prosecutor asking rhetorically in summation: "Who is worse? The twisted soul who tortures the maid, or the man of the house who lets it happen?").

It would be charitable to say that the sum total of what the government could muster in support of its fallback theory of *traditional* aiding and abetting was meager. The government's "affirmative acts" proofs were that petitioner accompanied his wife when she met each woman for the first time on arriving in the United States; that petitioner's immigration papers were kept in the same secure location as

the women's passports; that he spoke to his wife about the women on two occasions (when he noticed that Samirah had fallen asleep on the job and after he saw that she was eating from the garbage); that he occasionally drove the women to another location to do housework; and that he declined the gardener's offer to help the women move a heavy statue. It is a close question whether the government could have hoped to persuade a single juror that petitioner took such nominal and inherently innocuous "actions" with the intent to participate in and further another's criminal scheme.[7] Not open to dispute, however, is the government's utter inability to prove beyond a reasonable doubt that the jury surely took that far more difficult route to conviction rather than follow the government's invitation to find petitioner guilty simply because he failed to act.

A finding of instructional error would not only require reversal of the substantive counts of conviction but also of the intertwined conspiracy counts. *See, e.g., Parr v. United States*, 363 U.S. 370, 393 (1960). "If a jury is misled into considering as unlawful the omission of an act that the defendant is under no duty to perform, then a finding of conspiracy based on such conduct cannot stand." *United States*

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[7] It was *not* the government's theory that Varsha intended to force the women to work involuntarily from the outset (much less that petitioner knew of such a plan). Trial Tr. 4676–77. In fact, Samirah told investigators that Varsha's treatment of her became severe only in the final eight months before she left the Sabhnanis' residence. *See* Trial Tr. 2328. (That eight-month period followed the death of Samirah's son in Indonesia, a death that Samirah accused Varsha of causing by placing a spell on him. Trial Tr. 1685, 1703–04, 2736.) It therefore is highly unlikely that the jury saw criminal intent in either an "airport run" or the safe storage of immigration documents at the outset of each woman's employment.

v. Curran, 20 F.3d 560, 571 (3d Cir. 1994) (citing cases). Moreover, the government's introduction of evidence of Mahender's alleged non-actions, such as his refusal to help the domestic workers carry a statue, created "spillover" prejudice that likely influenced the jury on the conspiracy charge against him. *See Black v. United States*, 130 S. Ct. 2963, 2970 n.14 (2010) (remanding for consideration whether instructional error on mail-fraud counts caused "spillover prejudice" that would require vacatur of obstruction-of-justice conviction).[8]

Because the Second Circuit's approach to appellate review of challenged instructions cannot be reconciled with the precedents of this Court and breaks with the settled understanding that has prevailed in the courts of appeals, the Court should grant review and reverse the judgment.

B. The Government's Omission Theory Of Aiding And Abetting Conflicts With The Holdings Of This Court And The Courts Of Appeals

If this Court grants certiorari on the question whether the Second Circuit conducted an erroneous mode of harmless-error review, it should also grant review on the underlying legal question that the Second Circuit skirted: whether, as the government contends, a defendant may be found guilty under 18 U.S.C. § 2 for failure to act.

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[8] The portion of the sentence forfeiting petitioner's interest in his house and office, *see* D.E. 487 (E.D.N.Y. July 26, 2008), would obviously fall as well, because the forfeiture required a conviction. *See, e.g.*, *United States v. Aramony*, 88 F.3d 1369, 1387 n.11 (4th Cir. 1996); *cf. van Hofe v. United States*, 492 F.3d 175, 186–91 (2d Cir. 2007) (reversing forfeiture of wife's interest in home where her offense was not as serious as the husband's).

The government tried petitioner on a theory that broke with over a half-century of settled law in this Court and the courts of appeals. The seminal case on aiding and abetting was Judge Learned Hand's opinion in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). *Peoni* developed the classic formulation that this Court later adopted in *Nye & Nissen*: The law demands proof that the defendant "in some sort associate himself with the venture, that he *participate* in it as in something that he wishes to bring about, that he seek *by his action* to make it succeed." *Id.* at 402 (emphases added). The plain emphasis is "action"—that the defendant take an affirmative step in aid of the offense. The courts of appeals have accordingly concluded that it is not enough to be present and have "knowledge that a crime was to be committed." *United States v. Wilson*, --- F.3d ---, No. 09-3338, 2010 WL 3419674, at *8 (8th Cir. Sept. 1, 2010) (internal quotation marks omitted).[9]

Under this clear line of authority, "[t]o establish that the defendant participated in the criminal activity," the government must prove that the defendant "has *acted in some affirmative manner* to aid the venture." *United States v. Akpan*, 407 F.3d 360, 371 (5th Cir. 2005) (emphasis added); *supra* note 5.

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[9] *Accord United States v. Perez-Melendez*, 599 F.3d 31, 40–41 (1st Cir. 2010); *United States v. Huezo*, 546 F.3d 174, 181 (2d Cir. 2008); *United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010); *United States v. Spoone*, 741 F.2d 680, 686 (4th Cir. 1984); *United States v. Akpan*, 407 F.3d 360, 371 (5th Cir. 2005); *United States v. Morrow*, 977 F.2d 222, 231 (6th Cir. 1992) (en banc); *United States v. Samuels*, 521 F.3d 804, 811 (7th Cir. 2008); *Altamirano v. Gonzales*, 427 F.3d 586, 595 (9th Cir. 2005); *United States v. Summers*, 414 F.3d 1287, 1296 (10th Cir. 2005); *United States v. Diaz-Boyzo*, 432 F.3d 1264, 1269 (11th Cir. 2005) (per curiam); *United States v. Salamanca*, 990 F.2d 629, 638 (D.C. Cir. 1993).

The defendant must "provide an act of assistance," *United States v. Samuels*, 521 F.3d 804, 811 (7th Cir. 2008). Thus, the courts of appeals have thrown out aiding-and-abetting convictions when, for example, a defendant was a passenger in a vehicle that he knew contained illegal drugs, *see United States v. Sanchez-Mata*, 925 F.2d 1166, 1169 (9th Cir. 1991), was present during the planning of a robbery and knew that a firearm would be used in the robbery, *United States v. Davis*, 138 F. App'x 914, 915 (9th Cir. 2005), or was in close proximity to illegal drugs and was acquainted with the principal offender, *United States v. Jenkins*, 90 F.3d 814, 821 (3d Cir. 1996). In each case, the government had produced no evidence that the defendant "took any action to help [the offense] succeed." *Id.*

The theory on which the government tried this case—and on which it urged the Second Circuit to affirm petitioner's conviction—is flat-out incompatible with those long-settled principles. In the government's view, "aiding and abetting may be predicated upon a failure to act" even in the absence of a duty grounded in statute or common law. Pet. App. 159a–60a. And precisely *because* this supposed duty to act is freestanding, the government saw no reason to bother the jury with an instruction delineating the scope of petitioner's duty to act under the statutes with which he was charged.[10] Instead, it was the

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[10] As the Second Circuit recognized, even were the government correct that those in petitioner's position can owe domestic workers a legal duty of protection, the jury would need to have been instructed on the circumstances in which such a duty arises. *See Gaudin*, 515 U.S. at 512–13. The government's exhortation to the jurors to skip the affirmative-act findings and instead follow their own subjective notions of moral responsibility or respect for human dignity only aggravated the risk of er-

beginning and the end of the matter for the jury to find that petitioner knew his wife was engaging in unlawful conduct and that he did not try to intervene. *Id.* at 153–54a.

The government claimed to find support for this theory in Second Circuit *dicta* to the effect that proof of aiding and abetting requires "a voluntary act *or omission* by the person charged as an aider or abettor, with . . . the specific intent that his act *or omission* bring about the underlying crime." Pet. App. 160a (quoting *United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988)). But, as the panel below correctly pointed out, those passages referred to situations in which a clear legal duty to act has been established by statute, common law, or contract. *Id.* at 32a (citing *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990)). Not only is a separate duty to act missing in this case (*id.* at 32a & nn.12-13), the instructions allowed the jury to convict under an *unspecified* duty to act precisely because the duty was never defined. *Id.* at 32a–33a.

The only case the government cited below as support for aiding-and-abetting liability in similar circumstances was the Fourth Circuit's decision in *United States v. Bonetti*, 277 F.3d 441 (4th Cir. 2002). In *Bonetti*, the defendant was convicted of one of the substantive offenses at issue in this case—harboring an illegal alien—based on his wife's mistreatment of a domestic worker. *Id.* at 446. The jury also found that the harboring of the alien "'cause[d] serious bodily injury,'" which made the defendant eligible for a higher sentence. *Id.* (alteration in original) (quoting 8 U.S.C. § 1324(a)(1)(B)(iii)). The

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ror from an instruction that offered no guidance on the scope of the duty to act.

defendant challenged that finding insofar as it was grounded in the defendant's failure to take the worker to the hospital for medical treatment. The Fourth Circuit affirmed, finding, based on decisions of the Connecticut and Virginia Supreme Courts, that the defendant owed a duty to provide medical treatment to a person living in his house who could not obtain medical treatment herself. *See id.* at 447–48. *Bonetti* did not involve an aiding-and-abetting conviction (much less how to instruct when aiding and abetting *is* charged), but to the extent it can be read to mean that the Fourth Circuit has endorsed the government's incorrect view, this Court should grant review to resolve the question.

In short, if this Court grants certiorari on the first question presented, it should also resolve the question whether the government's theory of aiding and abetting is legally valid. In the alternative, if the Court reverses the Second Circuit's holding on the first question presented, it would be proper to remand to the Second Circuit for full consideration of the second question.

II. The Questions Presented Are Exceedingly Important For The Administration Of Criminal Justice

The Second Circuit's misunderstanding of principles established by this Court for the review of instructional error not only puts it into conflict with this Court and other circuits, but threatens to immunize highly "dubious" government theories of guilt from appellate review. For that reason, it is surpassingly important that this Court review the Second Circuit's hybrid harmless-error standard for instructions that carry the risk of leading a jury to convict for conduct that is not a crime. That hybrid standard—in which the potential for prejudice can be dismissed without examining trial evidence or the

government's arguments, and where the government is relieved of its burden of disproving prejudice beyond a reasonable doubt—will undoubtedly enable the government to obtain and preserve convictions with purposefully confusing instructions.

Moreover, the Second Circuit's misstatement and misapplication of the law in this case blocked review of the critical question whether aiding-and-abetting liability may be premised on a failure to stop or prevent another's wrongdoing. The aiding-and-abetting statute, 18 U.S.C. § 2, "is probably invoked more frequently than any other federal criminal statute." Baruch Weiss, *What Were They Thinking; The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1346 (2002). Moreover, "it is well established that a trial judge may properly give an aiding and abetting instruction even if the indictment does not expressly charge a violation of 18 U.S.C. § 2." *United States v. Mucciante*, 21 F.3d 1228, 1234 (2d Cir. 1994).[11] The availability of an omissions theory of aiding and abetting therefore has tremendous implications across the entire expanse of federal criminal law.

Despite the importance of the issue, there is substantial doubt whether an instruction like the one in this case will face serious scrutiny in the courts of appeals. That is because, as the panel noted below, the instruction at issue is included in the leading jury-instructions treatise. *See* Leonard Sand et al., *Modern Federal Jury Instructions—17 Criminal*, § 11-1 (2008 ed.) ("Participation in a crime is willful if done voluntarily and intentionally . . . with the

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[11] It is universally the case that "aiding and abetting need not be separately charged to support an instruction." *E.g.*, *United States v. Gonsalves*, 435 F.3d 64, 69 (1st Cir. 2006); *United States v. Wills*, 346 F.3d 476, 495 (4th Cir. 2003).

specific intent to fail to do something the law requires to be done[.]"). Both the First and Second Circuits cited the instruction's established pedigree in ultimately affirming. *See, e.g.*, Pet. App. 34a; *Bailey*, 405 F.3d at 111 n.4 ("It is a hornbook definition."). The prospect of federal prosecutors abusing this widely used instruction to peddle a defective failure-to-act theory of aiding-and-abetting liability is reason enough to grant review.

III. In The Alternative, This Court Should Grant The Petition, Vacate The Ruling Below, And Remand In Light Of *Skilling v. United States*

If this Court chooses not to review this case on the merits (either through briefing and argument or summary reversal), it should grant the petition, vacate the decision below, and remand in light of its recent decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010). In *Skilling*, this Court held that "errors of the *Yates* variety"—which permit a jury to convict for conduct that is not a crime—"are subject to harmless-error analysis" on direct review (and not solely on collateral review, as in *Pulido*). *Id.* at 2934 & n.46. Given that the Second Circuit plainly did not apply the harmless-error review required by this Court's precedents, at a minimum a grant, vacate, and remand disposition would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 8, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2008

Argued: February 5, 2009 Decided: March 25, 2010

Docket No. 08-3720-cv(L), 08-3731-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

-v.-

MAHENDER MURLIDHAR SABHNANI, VARSHA MAHENDER SABHNANI,

Defendants-Appellants.

Before: WESLEY, LIVINGSTON, *Circuit Judges*, and RESTANI, *Judge*.*

Defendants-Appellants Mahender Murlidhar Sabhnani and Varsha Mahender Sabhnani appeal from a judgment of the United States District Court for the Eastern District of New York (Spatt, *J.*). Fol-

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

lowing a jury trial, both defendants were convicted on counts of forced labor, harboring aliens, peonage, and document servitude, as well as conspiracy to commit each of the substantive offenses, with Mahender Sabhnani receiving a sentence of 40 months' imprisonment and Varsha Sabhnani a sentence of 132 months' imprisonment. The district court further ordered both defendants to pay substantial restitution to their victims and to forfeit their ownership interest in their home, where their victims had been held during the commission of the crimes at issue. On appeal, the Sabhnanis raise challenges to the district court's refusal to grant the defendants' request for a change of venue, its refusal to compel an independent psychiatric evaluation of a prosecution witness, its management of the presentation of witness testimony, the content of the jury instructions, the sufficiency of the evidence, the extent of the district court's inquiry into purported juror misconduct, the calculation of the applicable Guidelines sentencing range, the amount of restitution, and the scope of the property forfeiture. We vacate the district court's award of restitution to the victims and remand for recalculation of the amount. In all other respects we find Defendants-Appellants' arguments to be without merit.

Affirmed in part, vacated and remanded in part.

MONICA E. RYAN, Assistant United States Attorney (David C. James and Vincent Lipari, Assistant United States Attorneys, *of counsel*), for Benton J. Campbell, United States Attorney for the Eastern District of New York, Brooklyn, New York, *for Appellee*.

ALAN M. DERSHOWITZ (Victoria B. Eiger, Natham Z. Dershowitz, Amy Adelson and

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SUSAN C. WOLFE, Hoffman & Pollok LLP, New York, New York, *for Defendant-Appellant Varsha Mahender Sabhnani.*

DEBRA ANN LIVINGSTON, *Circuit Judge*:

Defendants-Appellants Mahender Murlidhar Sabhnani ("Mahender") and Varsha Mahender Sabhnani ("Varsha") (collectively "the Sabhnanis" or "appellants") appeal from judgments of the United States District Court for the Eastern District of New York following a jury trial before the Hon. Arthur D. Spatt, *Senior Judge*, convicting them of two counts each of forced labor in violation of 18 U.S.C. § 1589(a), harboring aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), holding a person in a condition of peonage in violation of 18 U.S.C. § 1581(a), and document servitude in violation of 18 U.S.C. § 1592(a), as well as conspiracy to commit each of these substantive offenses. The district court sentenced Mahender Sabhnani to 40 months' imprisonment, to be followed by a three-year term of supervised release, and ordered him to pay a $12,500 fine and a special assessment of $1200. Varsha Sabhnani was sentenced to 132 months' imprisonment, followed by a three-year term of supervised release, and was ordered to pay a $25,000 fine and a special assessment of $1200. The court also required both defendants to pay the sum of $936,546.22 in restitution to their victims, and ordered both defendants to forfeit their ownership interest in their home, where their victims had been held. The district court's for-

feiture order was stayed pending the disposition of this appeal. Varsha is currently serving her sentence, and Mahender was granted bail pending appeal by this Court.

The Sabhnanis jointly and individually make numerous arguments on appeal, including: (1) improper refusal by the district court to change the venue of the trial in light of negative publicity regarding the defendants; (2) erroneous refusal to compel a prosecution witness to submit to an independent psychiatric examination; (3) incorrect instruction of the jury to the effect that it could convict Mahender Sabhnani of the charged crimes on a theory of omission as opposed to affirmative action; (4) insufficiency of the evidence as to Mahender Sabhnani's convictions; (5) incorrect instruction of the jury prohibiting it from drawing an adverse inference from the refusal of prosecution witnesses to speak to defense counsel; (6) improper refusal to recall a prosecution witness following the completion of testimony and the beginning of jury deliberations; (7) insufficient investigation into purported juror misconduct; (8) procedural unreasonableness in Varsha and Mahender's sentencing, consisting of multiple errors in the district court's calculation of the applicable Guidelines range; (9) various errors in the calculation of the required amount of restitution; and (10) overbroad and unconstitutionally excessive property forfeiture. For the reasons that follow, we conclude that none of these challenges has merit, with the partial exception of the Sabhnanis' challenge to the calculation of the restitution award.

BACKGROUND

Mahender Sabhnani, a naturalized citizen of the United States born in India, lived with his wife, Var-

sha Sabhnani, a naturalized United States citizen born in Indonesia, in a single-family home in Syosset, New York with their four children. The jury found beyond a reasonable doubt that the Sabhnanis conspired to harbor in their Syosset home two aliens who were unlawfully in the United States — specifically, two domestic servants the couple brought from Indonesia. The jury further found that the Sabhnanis conspired to hold these two women in peonage, keeping their travel documents, and to have the aliens perform forced labor on the Sabhnanis' behalf. The jury also convicted the Sabhnanis of substantive counts of harboring, peonage, forced labor, and document servitude based upon the evidence of their mistreatment of the two women, Samirah and Enung. The evidence at the Sabhnanis' trial, viewed in the light most favorable to the government, demonstrated the following:

In 2001 and 2002, Varsha's mother, known as "Mrs. Joti," arranged for Samirah, a 53-year old woman from Indonesia, to obtain an Indonesian passport and United States visa in order to travel to the United States to work in the Sabhnanis' home. Samirah, a rice vender who spoke no English, did not know what a visa was. She did not know how to drive a car or use an American telephone. Samirah agreed to work in the United States as a domestic servant for $200 per month. She traveled to the United States in February 2002 in the company of Mrs. Joti, who carried Samirah's passport, and Varsha's brother Naresh. Mahender and Varsha Sabhnani met them at John F. Kennedy International Airport and drove them to the couple's home. Varsha Sabhnani took Samirah's passport and other related documents and kept them until approximately April 2007, about one year after Samirah's

passport had expired. Mrs. Joti returned to her home in Indonesia shortly after delivering Samirah.

Samirah worked as a domestic servant for Varsha and Mahender Sabhnani from February 2002 through May 2007, even though the visa that Mrs. Joti obtained for her authorized Samirah to enter the United States solely as Mrs. Joti's employee and to work for her in this country only until May 2002. During her time with the Sabhnanis, Samirah was responsible for cooking, cleaning, laundry, and other chores at the couple's large three-story residence, which included about seven bedrooms, seven baths, and separate offices from which Mahender Sabhnani operated PVM International and Eternal Love Parfums, the two companies that together constituted his international perfume and toiletry business.[1] Varsha told Samirah that her $200 per month salary was being paid to her daughter Lita in Indonesia. Lita was in fact paid only $100 per month. Samirah received no money herself.

The circumstances of Samirah's employment were more than severe. While at the Sabhnanis' home, Samirah, who had slept in her own bed at home in Indonesia, was required to sleep first on the carpet outside the bedroom of one of the children and then on a mat on the floor of one of the residence's kitchens. Samirah was not given adequate food to eat — to the point that she was often forced by hunger to eat from the garbage. She worked for ex-

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[1] The companies were principally engaged in the export of perfume, towels, body sprays and soaps to Dubai, the United Arab Emirates, Saudi Arabia, Singapore, Bahrain and other foreign markets.

tremely long hours per day and was often deprived of sleep. On one occasion in 2003, William Hespeler, an electrician performing work at the home, observed Samirah dressed in "raggedy clothes," following Mahender Sabhnani as she carried a food and beverage tray. Tr. 3586. Her meager dress that day was not atypical. Indeed, beginning around March 2007, Varsha Sabhnani refused to provide Samirah with even the semblance of adequate clothing, requiring her to wear tattered sweat pants and a top made from old rags and the cut remnants of a dress. Various witnesses testified that Samirah wore "torn or tattered," "messy" clothing, rags "used for cleaning the floor" and clothing that left her "private part . . . visible." Tr. 1786, 3834.

Samirah was subjected to extremely harsh physical and psychological treatment in the Sabhnanis' home. On one occasion sometime before 2005, for example, Samirah drank milk directly from a container, without using a glass; the incident was reported to Varsha Sabhnani by one of her daughters. Varsha responded by beating Samirah and pouring scalding hot water on her arm. At her mother's instruction, one of Varsha's daughters took a photograph of Samirah with the milk container. Varsha Sabhnani told Samirah that the photo would be sent to Samirah's family in Indonesia to prove that Samirah was a thief. The photo, which Varsha thereafter kept in a locked cabinet in a closet adjoining the Sabhnanis' bedroom, was introduced into evidence at the trial. It depicts the discoloration on Samirah's arm from the scalding.

The milk incident was not an isolated one. Samirah was beaten by Varsha Sabhnani with various household objects, such as a broom, an umbrella,

and a rolling pin. She was punished for sleeping late, for not receiving permission to throw out the garbage, for stealing food from the trash, and for failing to clean the garage. Varsha threw boiling water on Samirah on at least three separate occasions. She also mutilated Samirah, pulling on Samirah's ears until they bled, causing scabs and scars, and cutting Samirah with a knife, leaving scars on her face and various parts of her body. Wearing plastic supermarket bags on her hands, Varsha Sabhnani on more than one occasion pulled on Samirah's ears and dug her fingernails into the flesh behind them, causing blood to trickle down Samirah's neck. She punished Samirah for various alleged misdeeds by forcing her to eat large quantities of hot chili peppers until Samirah vomited or moved her bowels uncontrollably. Varsha forced Samirah to walk up and down flights of stairs many times in succession. Samirah was required to bathe several times in a row, sometimes with her clothes on, and was not infrequently made to work while wearing wet clothing. Varsha Sabhnani also cut Samirah's hair with scissors and shaved her pubic hair, threatening Samirah that if she resisted her children in Indonesia would be murdered by Mahender Sabhnani and by the couple's teenage son. Samirah "never fought back," according to her own testimony, "because [Varsha Sabhnani] always said, mind you, if you fight me off, then you [will] be killed by the mister," referring to Mahender Sabhnani. Tr. 1774. The abuse suffered by Samirah caused her to become so fearful that she would sometimes urinate on herself.

On at least three occasions, Varsha Sabhnani forced Samirah to write letters to Samirah's family in Indonesia that Varsha dictated and then took from Samirah and kept. These letters contained

statements to the effect that Samirah was a "crazy person," that she walked around naked, urinated and defecated on herself, and wished to die. Tr. 2360. They also contained a statement that, when translated, was interpreted to mean that Samirah purported to curse or cast a spell on her son, Erwin, who was deceased. Varsha threatened to send these letters to Samirah's family in Indonesia, but she actually kept them in the same locked cabinet in the closet adjoining the Sabhnanis' bedroom that contained Samirah's photograph with the milk container, as well as her passport and related documents.

Subject to this recurrent abuse, Samirah often asked to return to Indonesia or to be "give[n] . . . away" to another person. Tr. 1881. When she did so, Varsha Sabhnani told her that she would have to pay money to make up for the expenses the Sabhnanis had incurred in bringing her to the United States. Varsha told Samirah that Samirah's children would be killed if she escaped. Varsha also threatened Samirah that if she ran away, Varsha would falsely report to the police that Samirah had stolen food and jewelry and by this means have Samirah sent to prison.

Most of Samirah's day-to-day supervision came from Varsha Sabhnani, who ran the Sabhnanis' household and also spoke Indonesian, Samirah's native language. However, Samirah served not only Varsha, but also Mahender Sabhnani, who often scolded her and who at least on occasion directly required Samirah to undertake various jobs, including cleaning the bathroom in his office. Samirah testified that one of the Sabhnanis' daughters "maybe . . . [felt] pity" for her and intervened on her behalf one

day after Samirah was hit with a telephone, telling her mother that she would watch Samirah eat a raw chili pepper but then helping Samirah to throw it away. Tr. 1821. Mahender Sabhnani, in contrast, reported on Samirah's supposed misdeeds to his wife:

> Q. Did you sometimes get punished for things that you did that the Missus didn't see you do?
>
> A. Yes.
> Yes. The Mister would report to the Missus that I slept in the bathroom upstairs and the Missus would immediately hit me.

Tr. 1848.

Mahender informed Varsha Sabhnani on one occasion that he had seen Samirah eating food from the garbage and on at least one other that he had found Samirah sleeping in a bathroom.[2] These incidents resulted in Varsha's physically abusing the maid. Insofar as the record reveals, Mahender Sabhnani was not present on the occasions of Varsha Sabhnani's most violent physical abuse. He was present, however, when Samirah was forced to wear dripping wet or grossly inadequate clothing that left her body exposed. He saw his wife tear paper on which she had forced Samirah to write into small pieces and then throw it on the floor, only to require Samirah to pick the pieces up, one by one. Moreover, various marks on Samirah's body resulting from Varsha's maltreatment, as well as Samirah's swollen

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[2] In this instance, Samirah, who was washing an upstairs bathroom, fell asleep. Mahender told Varsha that Samirah "was not washing," but that "she was sleeping in the bathroom." Tr. 1869.

and mutilated face, were clearly visible to Mahender Sabhnani during the time Samirah lived in his home and served him.

In late 2004 and early 2005, the Sabhnanis acquired the services of Enung, another woman from Indonesia. Forty-seven years old, Enung, who had completed only the first grade and who, like Samirah, spoke no English, was also recruited by Mrs. Joti. A sister of Varsha's, Kareena Deepak Kirpalani, trained Enung at Kirpalani's residence in Indonesia and, along with Mrs. Joti and Kirpalani's husband, helped Enung acquire the necessary travel documents to come to the United States. Enung's I-94 Departure Form authorized only a brief stay of no more than six months. Nevertheless, Enung began work for the Sabhnanis immediately upon her arrival in the United States. She was met by Varsha and Mahender Sabhnani at the airport in January 2005. Varsha took Enung's passport and related travel documents and kept them in the same locked cupboard in the closet adjacent to the Sabhnanis' bedroom in which she also kept Samirah's passport and related documents, the photo of Samirah with the milk container, and the letters Samirah was required to write. Enung's passport remained there until discovered by law enforcement agents in May 2007, nearly two years after Enung was required to depart the country and two-and-one-half years after she began work for the Sabhnanis.

Enung, like Samirah, testified that she was made to work lengthy hours — from about 4:00 or 5:00 A.M. until late at night, seven days a week — and that she was generally denied food, sleep, and even medical care when sick or injured. Both Samirah and Enung testified to numerous occasions

on which they were driven by hunger to eat food from the trash.

Enung was also a witness to Samirah's maltreatment at Varsha Sabhnani's hands — maltreatment that appears to have worsened during the period after Enung's arrival. Enung observed Varsha hit Samirah with various household implements, pull on Samirah's ears, and throw hot water on her. She, like Samirah, testified that Samirah was required to wear eyeglasses with tape and plastic obscuring the lenses. Enung was present on many occasions when Varsha Sabhnani forced Samirah to eat whole raw chili peppers or chili powder mixed with salt, often until Samirah became violently ill. On one occasion Samirah refused to eat chili peppers. Varsha Sabhnani first threatened to have her drink cleaning fluid and then required her to take off her clothes and stand naked while Enung put tape on Samirah's body and ripped it off, causing Samirah to scream in pain.

Enung herself was not immune from these more atrocious forms of abuse. Varsha Sabhnani forced Enung to walk up and down stairs repeatedly as punishment for supposed misconduct. She required Enung to cut up her own clothing. On one occasion, after Enung was accused of stealing two pieces of chocolate, she was forced to stand in one place for approximately ten hours — from early in the morning until about 4:00 in the afternoon. Varsha and Mahender Sabhnani, as well as their son, laughed at her while she was being punished in this manner. On another occasion when Varsha Sabhnani was cooking, Enung handed her the wrong spice. Varsha hit Enung in the face with a metal spoon, causing Enung's face to bleed and leaving a scar. Varsha

also struck Enung with her fist and with a glass Pyrex cooking dish.

The Sabhnanis left the country for about two months each summer. So far as the record shows, the maids did not leave the residence or otherwise attempt to escape during these periods. Varsha told Enung that if she ran away, the police would shoot her. She also threatened that if Enung left, Enung's husband in Indonesia, who had received advance payment for Enung's services, would be arrested. During at least one of these summer absences, the Sabhnanis' large refrigerator was chained shut. The Sabhnanis on more than one occasion failed either to leave adequate food for the maids or to arrange for its provision. Samirah and Enung begged for food in these instances from both Deborah Litras, who worked for Mahender Sabhnani as the export manager of his businesses, and Anthony Pascarella, the Sabhnani's gardener, both of whom had brief contact with the maids on a few occasions and both of whom testified at trial.

In addition to providing the maids with food, Litras also mailed several letters on their behalf. After receiving the first of these letters, posted in July 2006, from the maids, Litras obliterated the return address on the envelope, concerned that if the letter was returned to the Sabhnanis, "that it might present a problem" for the maids, and she "really didn't want them to be in any kind of trouble if this was something that they weren't supposed to be doing." Tr. 3855. After posting this first letter on their behalf, Litras thereafter saw the maids only rarely: "Then I didn't see them ever, outside, by a shed, or else anything. I started noticing that I was never seeing them at all." Tr. 3 85 8.

The letter posted in July 2006 was received by Samirah's children in Indonesia and was introduced at trial. In it, Samirah inquired after her children and pleaded for their help: "[Y]ou must do the midnight prayers if you want your mother to live and be together with you again." Tr. 2055. She informed them that she was being tortured, not allowed to eat or sleep, that she was forced to take repeated baths, and that she was not permitted to wear adequate clothing in the cold. She stated, "I don't have the strength to work here anymore." Tr. 2052. Samirah asked her children to pray for her return and also to seek out a witch doctor to cast a spell "so that the Missus would send me home and pay for it." Tr. 2055. She advised her daughter, Lita, to seek her return by contacting Varsha Sabhnanis' relations, but not to disclose the true reason:

> Lita, don't say that your mother told you of being tortured, denied food, deprived of sleep, told to take a bath 30 times, clothes are torn to shreds, not allowed to wear double clothing in the winter. Lita, just say this, the children are grown, and working. So it's my turn to rest.

Tr. 2056. Samirah testified that she gave these instructions "[b]ecause if the Missus found out" she was complaining to her children, she would "get beat up some more."[3] Tr. 2062.

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[3] After receiving the letter, Lita and Leo, one of Samirah's sons, approached Mrs. Joti seeking to have Samirah returned to Indonesia. Mrs. Joti told them that they would have to wait until Samirah's "contract" had expired, Tr. 2557, and told them that they would have to pay 40 million rupiahs, or approxi-

Samirah and Enung approached Litras again in April 2007, some nine months after this letter was posted, when Litras was alone in Mahender Sabhnani's office and the Sabhnanis were not at home. The maids were "disturbed and rushed," "[u]pset." Tr. 3861. They came in together and threw raw chili peppers on the ground. Using gestures, they appeared to communicate that they were forced to eat them. Samirah, whose hair Litras described as "chopped up," showed Litras a large gash behind Samirah's right ear and a bruise below her left shoulder. Tr. 3863. According to Litras, "[t]he language barrier was very difficult," but the maids appeared to act out a scenario in which one maid was hit with an object and then was made to hit the other. Tr. 3874. Both maids were crying. Samirah and Enung provided Litras with another letter, which she also posted, resolving to herself that she "had to try to find out what was happening here." Tr. 3874. A few weeks later, on a morning on which Mahender Sabhnani was present in the office, Litras saw Samirah crouching at the office door that led down to the basement with blood dripping from her hairline. Litras gestured Samirah away so that Mahender Sabhnani would not see her.

[Footnote continued from previous page]

mately $4400. During one of several telephone conversations between Mrs. Joti and Leo, Mrs. Joti falsely told him that his mother was in Los Angeles. On another occasion she told him that his mother was "doing well" in America. Tr. 2732. In her third conversation with Leo, Mrs. Joti became angry and told Leo, who testified at trial, that she could have Samirah murdered.

Finally, on the evening of May 12, 2007, Samirah, who had been beaten about the face by Varsha in the preceding days and who testified that she was fearful she would soon be killed, ran away from the Sabhnanis' house carrying the expired Indonesian passport that Varsha had returned to her the previous month. Samirah entered a Dunkin' Donuts store in Syosset early the next morning. The people inside the Dunkin' Donuts were unable to communicate with Samirah because she did not speak English, but Samirah attempted to tell them of her plight. Witnesses testified that Samirah showed them the marks, bruises, cuts, and scars on her face and arms and made gestures as if she were pinching or slapping herself. A security videotape introduced at trial captured Samirah motioning towards her ears and pointing out her other injuries. The mother of the store manager, a certified nursing assistant, saw the wounds behind Samirah's ears and the marks on her forearms and told her son to call the police. Samirah was taken to the Nassau University Medical Center, where her treating physician diagnosed "[m]ultiple physical abuse." Tr. 2874. Doctors and nurses treated her ear wounds, which were infected, and Samirah, through an interpreter, told her treating physician about the abuse she had suffered. Police officers recovered from Samirah her passport, as well as a plastic bag Samirah had taken with her when she fled the Sabhnani's house, containing a piece of paper with Varsha's name and address on it, a number of other papers, and a single chili pepper. Police took a number of photographs of Samirah's injuries, including pictures of her ears, face, forearms, chest, neck, and back, which were admitted into evidence during the trial.

In the course of the resulting investigation, agents from Immigration and Customs Enforcement ("ICE") executed two search warrants at the Sabhnanis' home. During the first search, Varsha and one of her daughters told Enung to run away and hide, and agents discovered her in a small closet underneath the basement stairs. Enung provided agents with a knife stained with Samirah's blood and tissues; both of these Enung had secreted away on Samirah's departure. Enung also showed agents a broom and rolling pin with which Varsha had beaten Samirah, and gestured to the agents that this was their use. Agents also found a blood stain on the door leading from the basement to Mahender Sabhnani's office — the location at which Litras testified that she had observed Samirah crouching, with blood dripping from her hairline. DNA testing confirmed that the blood found on the door was Samirah's.

Agents also discovered that the Sabhnanis had placed dead bolt locks on the outside of both doors to the basement bathroom. This bathroom was used solely by Samirah and Enung. Samirah testified that at the time the locks were installed, Varsha told her that she intended to lock Samirah up in the bathroom because she was expecting a guest from the Indies and was embarrassed about having someone in her home "who [didn't] look good." Tr. 2272. Enung testified that Varsha threatened to lock Samirah in the bathroom with no food and to give both maids an "injection" there that would "dry up the blood" or make them "go crazy." Tr. 3245. Enung testified that she was rendered so fearful by virtue of this threat that she couldn't eat.

The Sabhnanis were arrested on May 14, 2007 on charges of committing forced labor. In a superseding indictment filed September 18, 2007, the Sabhnanis were charged with the following crimes: (1) two counts of forced labor or attempted forced labor in violation of 18 U.S.C. §§ 1589(a) and 1594(a);[4] (2) one count of conspiracy to commit forced labor in violation of 18 U.S.C. §§ 371 and 1589(a); (3) two counts of harboring aliens or attempting to harbor aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) and (v)(II);[5] (4) one count of conspiracy to harbor aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) and (v)(I); (5) two

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[4] 18 U.S.C. § 1589 provides in relevant part as follows:

> (a) Whoever knowingly provides or obtains the labor or services of a person by . . . means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person . . . shall be punished as provided under subsection (d).

18 U.S.C. § 1589(a). Section 1594(a) prohibits attempting to commit forced labor, peonage, and document servitude, among other offenses.

[5] 8 U.S.C. § 1324(a)(1)(A) makes criminally liable any person who:

> [K]nowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place, including any building or any means of transportation . . .

8 U.S.C. § 1324(a)(1)(A). Section 1324(a)(1)(A)(v)(II) prohibits aiding and abetting a violation of § 1324(a)(1)(A). Section 1324(a)(1)(A)(v)(I) prohibits conspiracy to commit the substantive offenses.

counts of peonage or attempted peonage in violation of 18 U.S.C. §§ 1581(a) and 1594(a);[6] (6) one count of conspiracy to commit peonage in violation of 18 U.S.C. §§ 371 and 1581(a); (7) two counts of document servitude in violation of 18 U.S.C. §§ 1592 and 1594(a);[7] and (8) one count of conspiracy to commit document servitude in violation of 18 U.S.C. §§ 371 and 1592. A seven-week trial followed; the evidence at trial consisted of testimony from many witnesses, including Samirah, Enung, Hespeler, Litras, Pascarella, Samirah's relatives from Indonesia, Samirah's treating physician, and law enforcement agents, as well as physical evidence recovered from the house and numerous photographs.

The defense case consisted primarily of the testimony of visitors to the residence who observed the maids and noted nothing unusual. During summation, counsel for both Varsha and Mahender Sabhnani contended that Samirah's and Enung's testimony could not be believed, and that, despite her denials, there was reason to believe that the marks

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[6] 18 U.S.C. § 1581(a) prohibits "hold[ing] or return[ing] any person to a condition of peonage . . ." 18 U.S.C. § 1581(a).

[7] 18 U.S.C. § 1592 provides:

> Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person . . . in the course of a violation of [§§ 1581, 1589, and 1594(a)] [or] with intent to violate [§§ 1581, 1589, and 1594(a)] . . . shall be fined under this title or imprisoned . . . .

18 U.S.C. § 1592.

on Samirah's body were the product of kerokan, an Indonesian folk remedy practiced by Enung that involved rubbing a hard object on the skin. Defense counsel suggested that Samirah was consumed with hatred of Varsha Sabhnani because she believed Varsha had cast a spell on her adult son, Erwin, who died in 2006, while Samirah was working for the Sabhnanis. Seeking financial reward, Enung supposedly manipulated Samirah's mental state to the point that Samirah was willing to testify about abuses that never occurred, while Enung falsely corroborated her story. Following the trial, both Varsha and Mahender Sabhnani were convicted on all counts.

DISCUSSION

I. Pretrial Motions

A. The Venue Motion

Appellants contend that the district court improperly denied their motion pursuant to Fed. R. Crim. P. 21(a) for a change of venue. We review the district court's disposition of such a motion for abuse of discretion. *United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990). Rule 21(a) provides in relevant part that "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a). The defendant must show "a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *Maldonado-Rivera*, 922 F.2d at 966-67 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (internal quotation marks omitted)). "In assessing the motion, the district court

may take into account, *inter alia*, the extent to which the government is responsible for generating the publicity, the extent to which the publicity focuses on the crime rather than on the individual defendants charged with it, and other factors reflecting on the likely effect of the publicity on the ability of potential jurors in the district to hear the evidence impartially." *Id.* at 967.

The Sabhnanis contend that the prosecution generated prejudicial pretrial publicity during bail hearings on May 15 and 17, 2007. In the course of the bail proceedings, the government described the charged crimes as involving "incomprehensible brutality and violence and inhumanity." The local news media printed and broadcast stories about the matter, several of which repeated the prosecution's statement that this was a case of "modern day slavery." The tabloid newspapers dubbed Varsha "Cruella," after the Disney villain Cruella de Vil, and printed details of the methods that the Sabhnanis allegedly used to torture their victims. During the weeks following the bail hearings, in which there was a significant amount of litigation over the bail conditions, *see United States v. Sabhnani*, No. 07-CR-429, 2007 WL 2769487, at *1-2 (E.D.N.Y. Sept. 21, 2007) (order denying transfer motion), the media reported on various developments in the case, continually referring to it as the "Slave Case." The coverage also repeatedly referenced the Sabhnanis' wealth and the value and size of their home.

We conclude that the district judge did not abuse his discretion in denying the Sabhnanis' motion to transfer venue. First, we agree with the district court that the prosecution's statements regarding the character of the crimes were proper in the context in

which they were made: bail hearings in which the prosecutors were arguing that the Sabhnanis were a danger to the victims and their families, justifying an order of pretrial detention. The prosecution's mention of the Sabhnanis' wealth was likewise proper in the context of arguing that the Sabhnanis were a risk of flight due to their substantial means. While a district court may consider the government's role in generating adverse publicity in deciding a motion for change of venue, legitimate advocacy at a court proceeding — even advocacy resulting in adverse pretrial publicity — does not constitute conduct for which the government is properly held responsible in a Rule 21(a) inquiry. Nor do we find any error in the district court's determination that, in any event, the press coverage appears to have been driven at least as much by comments of the Sabhnanis' counsel as by any prosecutor's statement. *See Sabhnani*, 2007 WL 2769487, at *3 & nn.4-6.

Second, we similarly conclude that the pretrial publicity here was not so pervasive and prejudicial as to have created a reasonable likelihood that a fair trial could not be conducted. The bail hearings took place in mid-May, and voir dire in the case began in late October, five months later. This is a shorter amount of time than has been present in some cases in which we have noted that the effects of publicity had dissipated by the time the trial began. *See, e.g.*, *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003). However, in *Maldonado-Rivera*, we affirmed the denial of a motion to transfer venue even though the district judge there found that the press coverage was "continuing and prominent." *Maldonado-Rivera*, 922 F.2d at 967 (describing district court's finding of "slightly more than one article per week over a three-year period). Moreover, the record here indicates, as

the district court found, that most of the press coverage tracked the frequent court proceedings in this case. *See, e.g.*, Varsha App. 10-11 (first appearance), 14-15, 22 (second bail hearing), 28-30 (indictment), 33-65 (litigation over bail conditions). Coverage of actual developments in a criminal case generally will not rise to the level of prejudicial publicity that will warrant a venue change.

Most importantly, the cases involving claims that pretrial publicity was so inherently prejudicial that a fair trial in the district could not be had draw a clear distinction between mere exposure to pretrial publicity and actual prejudgment by the venire of the issues to be decided in the case. "We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him . . . . To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community . . . ." *Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975). It is true that the Supreme Court has in the past stated that publicity can so saturate a community (and be so highly prejudicial to the defendants) that courts should in such cases presume a fair trial was impossible. *See, e.g.*, *Rideau v. Louisiana*, 373 U.S. 723, 724-26 (1963) (defendant was filmed, possibly without his knowledge, confessing to details of crime, and film was shown repeatedly on television in relatively small community); *see also Patton v. Yount*, 467 U.S. 1025, 1031 (1984) ("[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.") (describing the holding of *Irvin v. Dowd*, 366 U.S. 717 (1961)). Cases presenting this scenario are very

rare, however, and have been characterized by our sister circuits as "extreme situation[s]," *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc) (upholding rejection of motion to transfer venue of accused Cuban spies from Miami despite alleged pervasive prejudice against the Cuban government in the district), in which the "publicity in essence displaced the judicial process." *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998).

The Sabhnanis argue that we need not employ a presumption of prejudice here because there is actual evidence that the venire was biased. The record, however, does not establish that the venire had prejudged the Sabhnanis' case, and nothing argued to the district court or to this court suggests anything to the contrary. The Sabhnanis point to the voir dire and, in particular, to the responses to questioning by some potential jurors as evidence that these jurors, who were excused, had been biased against them by the media coverage.[8] They also point to an e-mail sent to the court by an excused potential juror, who claimed that other members of the venire were "lying" and pretending to "live in a cave" in order to serve on the jury in the case. Varsha App. 129-30.

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[8] We do not understand the appellants to be arguing that the trial jury, as opposed to the venire, was prejudiced by the media coverage. To the extent their arguments can be so construed, they were soundly rejected by the district court in its decision on the Sabhnanis' Rule 33 motion on the ground that the Sabhnanis could not demonstrate that any juror was actually exposed to prejudicial publicity. The appellants make no arguments here to demonstrate that this conclusion was erroneous in any respect.

We have noted, in the context of the appeal from a conviction involving crimes far more notorious than the ones in this case, that "the key to determining the appropriateness of a change of venue is a searching voir dire." *Yousef*, 327 F.3d at 155. Here, as in *Yousef*, the Sabhnanis did not renew their motion to change the trial's venue directly after the jury's voir dire, nor do they object here to the voir dire's sufficiency. Moreover, in seeking a new trial before the district court post-verdict, although Varsha did point to adverse publicity, she never contended that the voir dire itself was deficient in any respect. *See id.* (taking such silence as an "indication that counsel was satisfied that the voir dire resulted in a jury that had not been tainted by publicity"). The evidence the Sabhnanis point to establishes no more than that some members of the venire had been exposed to publicity, and that some may have been reluctant to admit it. We have rejected claims that the venire was not sufficiently impartial in cases in which the evidence that excused potential jurors had formed an opinion of the defendant's guilt or innocence based on pretrial publicity was far more substantial. *See, e.g.*, *Knapp v. Leonardo*, 46 F.3d 170, 176 (2d Cir. 1995) (finding no manifest error in state court's determination that jury was impartial when defendant argued that 83% of veniremen were excused because they had prejudged the case); *see also United States v. Higgs*, 353 F.3d 281, 308-09 (4th Cir. 2003) (affirming denial of motion to transfer venue in which majority of potential jurors had heard about the case and several stated that they had formed an opinion based on publicity). Here, neither the character of the publicity nor the extent to which potential jurors were either exposed to it or affected by it warrants the conclusion that a presumption or inference of

generalized prejudice was appropriate in this case. We conclude that the district court's denial of the motion for a change of venue was not an abuse of discretion.

B. The Motion for a Psychiatric Examination

Appellants next assert that the district court erred in denying their motion for a psychiatric examination of Samirah. The motion was based on: (1) the affidavit of Dr. Barent Walsh, a clinical social worker providing therapy to "self-injuring persons," which stated, based on Dr. Walsh's examination of photographs of Samirah's injuries, that although he could not be certain since he had never seen her, the photographs showed injuries that could "be consistent with self-injury," Varsha App. 251; (2) Samirah's discharge papers from the Nassau University Medical Center, which noted that she was being referred to an "outpatient psychiatry clinic"; and (3) the affidavit of one of the appellants' daughters which stated that she had frequently observed Samirah behaving in a "strange fashion" (for instance by urinating uncontrollably), and that she had heard Samirah state after the death of her son, Erwin, that she "deserve[d] to be punished." Varsha App. 246-47. The Sabhnanis also relied on letters written by Samirah that contained what they argued to be further evidence of Samirah's possible mental instability. Judge Platt denied the motion, which the defense renewed shortly prior to trial before Judge Spatt.[9] At that time, the defense also relied on the deposition testimony of Samirah's daughter Lita regarding in-

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[9] This matter was originally assigned to Judge Thomas C. Platt, and was reassigned to Judge Spatt shortly before trial.

formation that Varsha Sabhnani had provided to her about Samirah's behavior. Judge Spatt denied the renewed motion.

"Ordering a witness to undergo a psychological examination is a drastic measure." *United States v. Russo*, 442 F.2d 498, 503 (2d Cir. 1971); *see also United States v. Kehoe*, 310 F.3d 579, 592 (8th Cir. 2002). Given the "inherent problems in allowing psychiatric examination of a witness," including "invasion of privacy, limiting availability of witnesses, [and] chilling testimony," *United States v. Gates*, 10 F.3d 765, 766 (11th Cir. 1993), a court should exercise its discretion to require such examinations only sparingly. Here, the Sabhnanis do not claim that Samirah was incompetent to testify, but only that the district court abused its discretion by failing to allow the defense to gather evidence of Samirah's psychological state that could have been used to impeach her credibility. We conclude that this argument is without merit.

In *Russo*, where we rejected the argument that a purported "pathological liar" should have been required to undergo an independent psychiatric exam, we noted that so long as "the jury from its observation has the opportunity to appraise the credibility of the witness in the light of the facts impugning his veracity, this constitutes the constitutional safeguard of a defendant's rights." 442 F.2d at 502. This precept is fully applicable here. The jury had a full opportunity in this case to assess Samirah's credibility, and a psychiatric examination would not have added measurably to its ability to do so. Samirah testified for part or all of six days, and faced exten-

sive cross-examination.[10] The Sabhnanis argue that because Samirah's testimony was given through an Indonesian interpreter the jury was unable to assess her tone of voice. Even assuming this to be case, however — a matter on which we express no opinion — the fact that Samirah's testimony was conveyed to the jury through the medium of an interpreter did not measurably lessen the jury's ability to assess other aspects of her testimony, such as the content of her statements, her body language, and her facial expressions. *Cf. Vasquez v. Kirkland*, 572 F.3d 1029, 103 8 (9th Cir. 2009) (testimony by deaf-mute through two separate sets of interpreters did not deprive defendant of opportunity to cross-examine witness; jury could assess credibility because witness testified under oath and jury could observe her demeanor). The Sabhnanis also point to Samirah's testimony that Varsha Sabhnani put a spell on Samirah's son Erwin as evidence of Samirah's unstable mental condition. That the jury heard this testimony, however, only further undermines any claim that a psychiatric examination was needed to assist the jury in evaluating Samirah's state of mind.

We conclude that the district court acted well within its discretion in determining that the evidence proffered by the appellants in support of their motion was insufficient to show the need for a psychiatric exam. Dr. Walsh's affidavit, based only on a review of photographs, indicated merely that Samirah's injuries might "be consistent with self-

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[10] The jury also heard testimony from Samirah's treating physician at Nassau University Medical Center, Dr. Ami Attali, who testified regarding Samirah's mental state while at the hospital.

injury" — an assertion that fell well short of demonstrating any mental instability, much less mental instability warranting the conduct of a psychiatric examination. *Cf. United States v. Gutman*, 725 F.2d 417, 420 (7th Cir. 1984) (finding no abuse of discretion in the district court's refusal to hold a hearing to determine whether a witness with a history of mental illness was competent to testify). Similarly, Samirah's letters, most of which Samirah testified Varsha dictated to her and forced her to write, did not demonstrate the need for investigation into Samirah's mental state and, in any event, were themselves available for assessment by the jury. The hospital discharge papers noting Samirah's referral to an outpatient psychiatric clinic do not explain the reason for the referral, but Dr. Attali testified that such a recommendation is routine for most recovering trauma victims. The district court did not abuse its discretion by declining to afford these notes much weight. Finally, neither the Sabhnani daughter's affidavit attesting to Samirah's "strange" behavior — much of it, according to Samirah's later testimony, caused by the Sabhnanis' mistreatment — nor the deposition testimony of Samirah's daughter, which merely reported Varsha Sabhnani's self-serving statements, established a compelling need for Samirah's examination. The district court did not err, much less abuse its discretion, in determining that a psychiatric examination was not warranted.

II. Mahender Sabhnani's Jury Instruction and Sufficiency Challenges

Mahender Sabhnani raises two claims of error with regard specifically to his convictions. First, he contends that the charge to the jury on aiding and abetting erroneously allowed the jury to convict him on an omissions theory of liability, rather than on

any affirmative acts he might have taken to aid and abet his wife's criminal conduct. This error, he contends, infected every count on which he was convicted and requires that all of his convictions be vacated. Second, he contends that the evidence was insufficient to sustain the convictions on any of the twelve counts on which the jury convicted him. We disagree with both claims.

A. Mahender Sabhnani's Jury Instruction Challenge

The government charged both defendants under the aiding and abetting statute, 18 U.S.C. § 2, as well as under the specific substantive statutes at issue. Mahender Sabhnani asserts error in approximately forty words in Judge Spatt's 792-word instruction on aiding and abetting. In particular, he contends that the district court's instruction on willfulness permitted the jury to convict him for failing to act.[11] Because none of the statutes pursuant to which he was charged predicates liability on a failure to act, he argues, and because no common law duty to act is at issue in this case, or was part of the jury charge, this instruction was erroneous, requiring his

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[11] The instruction, which was given twice, reads in its entirety as follows:

> Participation in a crime is willful if action is taken voluntarily and intentionally or in the case of a failure to act with the specific intent to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or to disregard the law.

Tr. 5035.

convictions to be vacated. For the following reasons, we disagree.

A defendant challenging a jury instruction as erroneous must show "both error and ensuing prejudice," *United States v. Quinones*, 511 F.3d 289, 313-14 (2d Cir. 2007), and we review the jury instructions "de novo . . . viewing the charge as a whole," *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)). "De novo review leads us to [find] error if we conclude that a charge either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." *Id.* (quoting *United States v. Doyle*, 130 F.3d 523, 535 (2d Cir. 1997)) (alteration in original) (internal quotation marks omitted). We emphatically do not review a jury charge "on the basis of excerpts taken out of context," but in its entirety, *see United States v. Mitchell*, 328 F.3d 77, 82 (2d Cir. 2003) (quoting *United States v. Zvi*, 168 F.3d 49, 58 (2d Cir. 1998)) (internal quotation marks omitted), to determine whether considered as a whole, "the instructions adequately communicated the essential ideas to the jury." *United States v. Tran*, 519 F.3d 98, 105 (2d Cir. 2008) (quoting *United States v. Schultz*, 333 F.3d 393, 413-14 (2d Cir. 2003) (internal quotation marks and alterations omitted)); *see also Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.").

At the start, we find dubious the government's claims that aiding and abetting liability may generally be predicated upon a failure to act unconnected to any legal duty to do so, that the statutes at issue

created an affirmative duty to act, or that Mahender Sabhnani was properly found by the jury to have violated a common law duty that required him to act. It is a long-established principle that criminal law generally regulates action, rather than omission, and that "[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act — a legal duty and not simply a moral duty." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.2 (2d ed. 2008).[12] This general principle, that omissions may serve as the basis of criminal liability only if there is an affirmative duty to act, is equally applicable when the crime charged is aiding and abetting. *See United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990) ("To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime."). Here, none of the statutes pursuant to which Mahender was convicted expressly impose an affirmative duty to take action, lest a crime be committed.[13] And even assuming, *ar-*

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[12] Such a legal duty to act can arise from a statute specifically creating the duty — the duty to file one's tax returns, for instance, *see* 26 U.S.C. § 7203 — or by extrapolation from a different statute, the common law, or contract. 1 LaFave, *Substantive Criminal Law* § 6.2.

[13] The document servitude statute, 18 U.S.C. § 1592, which criminalizes the knowing destruction, concealment, removal, confiscation, or possession of immigration documents of another, may come the closest — predictably enough, as criminal possession statutes often straddle the line between regulating an act and an omission. *See* Sanford H. Kadish *et al.*, *Criminal*

guendo, that Mahender Sabhnani owed a common law duty to the maids that was sufficiently well established in our legal tradition and practice that it constitutes part of the background common law against which these statutes should be interpreted, *see, e.g., Morisette v. United States*, 342 U.S. 246, 250 (1952); *United States v. Rybicki*, 354 F.3d 124, 135-36 (2d Cir. 2003) (en banc), the jury here was not charged on the nature of this duty nor instructed as to the factors it should consider in determining whether the duty was discharged. *See Jones v.*

[Footnote continued from previous page]

Law and Its Processes: Cases and Materials 207 (8th ed. 2007). We have held that constructive possession — established by a showing that "a defendant knowingly had the power and the intention at a given time to exercise dominion and control over [an item]" — can be sufficient to render a defendant criminally liable under such a statute. *United States v. Chavez*, 549 F.3d 119, 129 (2d Cir. 2008) (quoting *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001)) (internal quotation mark and alteration omitted) (constructive possession of a firearm was sufficient for a conviction under 18 U.S.C. § 924(c)); *see also United States v. Jones*, 531 F.3d 163, 168-69 (2d Cir. 2008) (constructive possession of narcotics was sufficient for a conviction under 21 U.S.C. § 841(a)(1)). Under this definition of constructive possession, one could violate § 1592 by forming the specific intent to possess the immigration documents of another while having knowing control over them — in theory, without taking any affirmative act. Even accounting for this possibility, however, possessory offenses do not expressly impose affirmative duties to act in the manner of traditional omissions statutes, which, in effect, require affirmative conduct to be taken to avoid commission of the crime. *See, e.g.*, 18 U.S.C. § 2250(a) (knowing failure to register or update a registration as a sex offender by one who is required to do so); 50 U.S.C. § 462 (failure to perform a duty of registration by one required to do so under the Military Selective Service Act).

United States, 308 F.2d 307, 310-11 (D.C. Cir. 1962) (reversing on plain error review where a jury was not instructed as to the nature of the common law duty that was the basis for omissions liability).

We need not decide the question whether in the circumstances of this case Mahender Sabhnani could properly be convicted based upon an omission to act, however, because we reject his claim that the district court's instruction on willfulness, considered in the context of the aiding and abetting instruction as a whole, rendered the instructions so confusing as to permit the jury to convict him on this basis. To be clear, the jury was instructed that participation in a crime is willful if action is taken voluntarily and intentionally, or in the case of a failure to act, with specific intent to fail to do something the law requires. Drawn nearly verbatim from the model jury instruction in the leading treatise on the subject, *see* 1 Leonard Sand *et al.*, *Modern Federal Jury Instructions — Criminal*, ¶ 11.01, at 11-4 (2008 ed.), this instruction was not inaccurate, however, but simply extraneous to this case — at least absent further instruction as to a legal theory that would support liability based on a failure to act.

When a jury charge contains language that could potentially confuse the jury as to the applicable law, we look to see whether the charge as a whole adequately instructed the jury as to the applicable legal standard. *Cupp*, 414 U.S. at 146-47. Here, the jury was never told that either Mahender or Varsha Sabhnani could be convicted of aiding and abetting based upon a failure to act. Indeed, immediately before the instruction on willfulness, the jury was informed that "[i]n order to aid or abet another to commit a crime, it is necessary that the defendant

willfully and knowingly associate herself in some way with the crime and that she or he willfully and knowingly seek *by some act* to help make the crime succeed." Tr. 5035 (emphasis added). Immediately after the challenged language, the jury was instructed that the "mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting." Tr. 5036. *Cf. United States v. Elfgeeh*, 515 F.3d 100, 134-35 (2d Cir. 2008) (finding it "highly unlikely" that jury relied on erroneous sentence that was immediately preceded and followed by correct statements of the charge). An aider and abettor, the district court said, must "know that the crime is being committed and *act* in a way which is intended to bring about [its] success." (emphasis added).

The repeated emphasis in the instructions on the proposition that an aider and abettor must "seek by some act to make the crime succeed" was further stressed in the judge's summary of the charge. The district court instructed the jury to ask itself three questions to determine whether a defendant aided or abetted the commission of a crime:

> Did the defendant participate in the crime charged as something she or he wished to bring about?
>
> Did the defendant associate herself or himself with the criminal venture knowingly and willfully?
>
> Did the defendant seek *by her or his actions* to make the criminal venture succeed?

Tr. 5036 (emphasis added). If the government proved beyond a reasonable doubt that the defendant did these things, the district court instructed, "then the defendant is an aider and abettor and therefore guilty of the offense." But "if on the other hand your answers to any one of these series of questions . . . is no," Judge Spatt continued, "then the defendant is not an aider and abettor and you must find him or her not guilty as to aiding and abetting." Tr. 5036-37.

We conclude that the charge's repeated emphasis on the necessity of acting in order to aid and abet, coupled with the crystal clear summary, was sufficient to ameliorate any possible confusion that might conceivably have arisen from the willfulness instruction. *See Brown v. Greene*, 577 F.3d 107, 111-12 (2d Cir. 2009) (collecting cases upholding jury charges containing language that might have created some confusion about the burden of proof, because the charges as a whole made clear that the cases were governed by the "beyond a reasonable doubt" standard); *United States v. Locasio*, 6 F.3d 924, 941 (2d Cir. 1993) (ambiguous summary of element did not warrant reversal where earlier discussion of element was clear). This was not a case in which the jury instructions were insufficiently detailed as to an essential element of the crime *and* were never clarified by other language, such that the jury could have convicted based on a legally erroneous theory. *See, e.g.*, *United States v. Hassan*, 578 F.3d 108, 129-34 (2d Cir. 2008) (instructions that failed to explain to jury that defendant needed to have intent to import particular controlled substance and that other substances referenced in the evidence were not controlled substances left open possibility for jury to convict on importation of other substances that were

not illegal). Here, the instructions clarified what was required to convict, and the judge's three-question summary of the charge was perfectly clear, removing the possibility of any confusion on the jury's part. *Cf. United States v. Moran*, 493 F.3d 1002, 1009-10 (9th Cir. 2007) (while instructions might have had "minor ambiguity" after a "careful picking apart" of their wording, clear summarizing or overview paragraph that conveys basic point to jury can cure potential error).

Mahender Sabhnani makes two arguments in reply. First, he contends that Judge Spatt erroneously believed that he could be convicted for aiding and abetting based solely on his failures to act. To be sure, when counsel objected to the instruction on willfulness during the charging conference, Judge Spatt did overrule the objection, suggesting that the employer of a domestic servant does have an obligation to act when he allows "for five years . . . beatings, deprivation, lack of food, sleeping on the floor, wearing tattered gowns, [and] hit[s] with a stick" to take place in his home. Tr. 4427. Notably, however, in denying Mahender's Rule 29 motion, the judge noted that "there was sufficient evidence at the trial to prove that Mahender affirmatively acted with the specific intent to advance the crimes alleged in the indictment." Even more importantly, the jury only heard the instructions, not Judge Spatt's opinion at the charging conference, and our concern on appeal is the *effect* of jury instructions, not "the district court's *purpose* in stating the jury instructions as it did." *Hassan*, 578 F.3d at 132. Mahender points next to the government's summation. In his sole reference to the necessary requirements for aiding and abetting, the government attorney stated without objection during the main summation that:

> You don't have to have actually committed the crime to be an aider and abettor. All that needs to be established is that somebody else committed the crime, and that you knowingly and willfully associated yourself with that other person in some way to help with the crime. Help with the crime. And that can be done by actions, or it can be done by a failure to act.
>
> A failure to act with specific intent, to fail to do something the law requires.

Tr. 4693. Mahender contends that these words created a "not insubstantial" risk that the willfulness instruction led the jurors to convict him on an invalid basis. Mahender's Br. 29. Here, however, we have already determined that the jury instructions, read as a whole, clearly apprised the jury of what it was required to find in order to convict. We agree that a party's summation can heighten the *already present risk* that an erroneous jury instruction may mislead the jury. *See, e.g.*, *United States v. Joseph*, 542 F.3d 13, 18-19 (2d Cir. 2008). But that situation is not this case. The jury instructions, which we presume that jurors follow, *see, e.g.*, *United States v. Stewart*, 433 F.3d 273, 310 (2d Cir. 2006), were clear that Mahender could not be convicted solely because he knew of Varsha's crimes or acquiesced in her actions, without acting himself. And to the extent the prosecutor's summation did misstate the applicable law, Mahender raised no objection below and does not press the issue here in those terms.

Given our conclusion that the instructions as a whole adequately conveyed to the jury the law it was to apply, we need not and do not address Mahender's argument that the error he alleges was sufficiently

prejudicial to taint each of his convictions, including the four separate conspiracy convictions to which the challenged instructions did not apply. We conclude simply that the aiding and abetting instruction, considered as a whole, adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting, and that Mahender's argument to the contrary is without merit.

B. Sufficiency of the Evidence

Mahender also challenges the sufficiency of the evidence to support his convictions for forced labor, peonage, document servitude, and conspiracy to commit these crimes. We review de novo challenges to the sufficiency of the evidence. *United States v. Abdulle*, 564 F.3d 119, 125 (2d Cir. 2009). In reviewing a claim that the evidence was insufficient to sustain a defendant's conviction, "we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility." *United States v. Parkes*, 497 F.3d 220, 225 (2d Cir. 2007) (quoting *United States v. Arena*, 180 F.3d 380, 391 (2d Cir. 1999)) (internal quotation marks omitted). "We will sustain the jury's verdict[s] so long as any trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (internal quotation marks omitted).

Mahender's main contention on appeal is that the trial evidence was insufficient to show he had knowledge that Varsha was threatening or physically abusing the maids — and thus *a fortiori* that the evidence was inadequate to establish his intent to participate in the crimes of forced labor and peon-

age, whether as a principal, an aider and abettor, or a conspirator. Mahender does not directly challenge the sufficiency of the evidence to support his convictions for document servitude and conspiracy to commit document servitude, but instead argues that because the evidence was insufficient to sustain his forced labor and peonage convictions, he cannot be guilty of these "derivative" offenses. For the following reasons, we disagree with these contentions.

1. Forced Labor and Peonage Convictions

With regard to the forced labor charges, 18 U.S.C. § 1589 at the time of the Sabhnanis' convictions prohibited "knowingly provid[ing] or obtain[ing] the labor or services of a person by," *inter alia*, "threats of serious harm to, or physical restraint against, that person," "by means of any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor . . . that person or another person would suffer serious harm or physical restraint," or "by means of the abuse or threatened abuse of law or the legal process." 18 U.S.C. § 1589(a)(1)-(3) (2000). The jury convicted Mahender of obtaining the labor or services of Samirah and Enung both "through threats of serious harm or physical restraint against [them]" and "through a scheme, plan or pattern intended to cause [them] to believe that non-performance would result in serious harm." Verdict Sheet 2-4. The peonage statute, 18 U.S.C. § 1581(a), prohibits "hold[ing] or return[ing] any person to a condition of peonage . . . ." To prove peonage, "the government must show that the defendant intentionally held a person against his or her will and coerced that person to work in order to satisfy a debt by (1) physical restraint or force, (2) legal coercion, or (3) threats of

legal coercion or physical force." *United States v. Farrell*, 563 F.3d 364, 372 (8th Cir. 2009).

At the start, the jury had a more than ample basis on which to conclude that Mahender knew of both the threatened and actual maltreatment of Samirah and Enung. "[J]urors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences" of a defendant's knowledge and his criminal intent. *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008). Here, Samirah and Enung lived and worked in Mahender's home — a home from which he also operated his business — for five and two-and-a-half years, respectively. The jury was entitled to credit the maids' testimony that during this time Mahender witnessed his wife humiliate them — when, for instance, Enung was required to stand in one place until she confessed to stealing chocolate and Samirah was forced to pick up one by one the tiny pieces of paper that Varsha Sabhnani had just thrown to the ground. There was substantial evidence, moreover, that Mahender observed Samirah eat from the trash and wear rags that were inadequate even to cover her body. Indeed, Enung identified one such rag and confirmed that Mahender, along with the rest of the family, observed Samirah wear it every day — even after it had been repeatedly cut up and resewn at Varsha's command, "every time [Samirah] made [a] mistake." Tr. 3196. Samirah testified that Mahender saw her "every day" between 2005 and 2007, Tr. 2367 — a period during which Varsha repeatedly cut Samirah on the face with a knife and, indeed, on one occasion (after a report from her husband) beat Samirah about the face with an umbrella, leaving Samirah's face bleeding and swollen. Tr. 1855-57. Samirah testified that Mahender saw her wearing rags and

that he "[saw her] face, . . . the clothings . . . [and] all the marks from the beating from missus. I would cry and the mister would look at me." Tr. 2368. Litras, Mahender's employee, did not live in the Sabhnani household and saw the maids only infrequently. Tellingly, however, even apart from the injuries the maids directly showed her in April 2007, she testified to noticing their "very messy . . . tattered and torn" clothing and, on one occasion, blood dripping from Samirah's hairline. Tr. 3860. The jury clearly had more than ample evidence from which to infer Mahender's awareness of the maids' plight.

There was also sufficient evidence of Mahender's intent to use Varsha's threats and maltreatment against the maids in order to obtain their labor. Samirah testified that on one occasion when she fell asleep cleaning a bathroom of one of the children, "mister told missus that Sami [Samirah] was not washing, but . . . was sleeping in the bathroom" and Varsha Sabhnani "came with something to hit." Tr. 1869. Samirah, afraid, ran away and urinated by the stairs, soiling Mahender's shoes as two of the children cried. Samirah further testified as follows:

> Q. Did you sometimes get punished for things that you did that the Missus didn't see you do?
>
> A. Yes.
>
> Yes. The Mister would report to the Missus that I slept in the bathroom upstairs and the Missus would immediately hit me. And another time . . . it was during the fasting months for the Muslims. I couldn't fast because I didn't eat in – I ate [food] from the garbage, and the Mister saw it, and told the Missus about it,

> and immediately the Missus got very angry. "You again stole the food?" And I said I found it in the garbage, and I was hit.

Tr. 1848-49. It is of no importance that, as Mahender points out, Samirah testified that he was not present when Varsha hit Samirah for eating the food, nor does it matter whether he was present on the other occasions when she was punished after he reported her misdeeds. The jury was not required, as Mahender contends, to infer that he was acting charitably by reporting the maids' conduct to his wife. On the contrary, the jury was entitled to infer from these incidents and from the other evidence of Mahender's knowledge of abuse that when Mahender reported Samirah's conduct to Varsha, he knew how she would react.

Mahender contends that even if there is sufficient evidence to support his conviction for forced labor, his peonage conviction is infirm because there was no direct evidence that he held Samirah and Enung in involuntary servitude in satisfaction of a real or alleged debt. Samirah, Enung, and Samirah's daughter, Lita, testified that Varsha told them repeatedly that if the maids wanted to be returned to Indonesia they would have to reimburse the costs of bringing them to the United States. Enung specifically testified that she did not run away from the Sabhnanis' residence in part because she "still owe[d]" months of work to Mahender and Varsha. "I was very frightened. I didn't dare to go out of the house prior to the debt being paid off." Tr. 3188. Mahender concedes that this testimony, if credited, might be adequate to support his wife's conviction. He contends, however, that it is insufficient to estab-

lish *his* intent to hold the maids in satisfaction of a debt because he "was not present during any conversation about repaying money." Mahender's Br. at 58. We disagree that this is the relevant question, and that the evidence was insufficient in any respect.

18 U.S.C. § 1581(a) prohibits the holding of a person in "a condition of peonage." Peonage is compulsory service in payment of a debt that can be real or artificially created. *See Bailey v. Alabama*, 219 U.S. 219, 242 (1911); *Pierce v. United States*, 146 F.2d 84, 86 (5th Cir. 1944). Here, the jury was entitled to infer first that Mahender knowingly participated in the creation of an obligation on the maids' part to work. The jury was entitled to infer that the appellants paid for the maids' travel to the United States based not only on the involvement of Varsha Sabhnani's family, but also upon Varsha's statements that this money had to be repaid if the maids were to leave. Samirah testified, for instance, that when she begged to be given away she was told by Varsha that she was brought to the United States in an airplane and that if she was to be given to someone else, that cost would have to be paid back: "[T]he missus answered, you think I have money tree? You came here with money. If you had 100 million [rupiahs], I'll give you to someone else." Tr. 1881. Enung also testified that her salary was paid "upfront" in its entirety, and that Varsha was supposed to be the one paying it. The jury was permitted reasonably to infer that Mahender knew of these payments, and that they evinced an intent to create a debt-like obligation on the maids to work. *Cf. Pierce*, 146 F.2d at 85-86 (evidence sufficient to support peonage conviction when defendant, among other acts, paid the full fine owed by incarcerated women in exchange for them agreeing to work for him); *Bernal v.*

United States, 241 F. 339, 341 (5th Cir. 1917) (defendant convicted of peonage paid for victims' transportation to come to work for her).

Second, the evidence also sufficiently demonstrated that Mahender, who benefitted from the maids' labor, knew that the maids were being forced to work and that the maids were completely dependent on the Sabhnanis for food, clothing, and shelter, the family's provision of which contributed to the maids' obligated status. *Cf. Pierce*, 146 F.2d at 85-86 (defendant contributed to victims' indebtedness by buying them clothes and other gifts). Indeed, the record shows that during the summer months when the Sabhnanis departed, neglecting to leave adequate provisions for the maids, it was Mahender who called Litras to put her in touch with his wife, who instructed Litras to obtain food — usually many loaves of bread — for the maids, and to pay for it with petty cash from Mahender's office.[14] From the evidence that Mahender reported on Samirah when she foraged in the garbage for something to eat, the jury was entitled to infer both that Mahender knew the maids were in a condition of abject dependence, and that he both intended and acted to keep them in that state. Under these circumstances, the evidence supported the conclusion that Mahender, having knowingly contributed to the creation of the maids' indebted situation and knowing of their dependence on the family, forced the maids to work through the

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[14] Litras testified that generally speaking her only contact with the maids during the summer months was on these occasions when she passed food to them through a partially opened door — and that she never saw the maids outside when the Sabhnanis were away.

threat of violence from his wife. We therefore conclude that there was sufficient circumstantial evidence from which the jury could infer that Mahender acted to aid and abet the holding of the maids in satisfaction of their "obligations" to the Sabhnanis.

For substantially the same reasons, we also reject Mahender's claim that the evidence was insufficient to support his convictions for conspiracy to commit forced labor and peonage. The existence of a criminal agreement between two persons can be inferred from circumstantial evidence. *Huezo*, 546 F.3d at 180; *see also United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) (Friendly, *J.*) ("Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant."); *United States v. Amiel*, 95 F.3d 135, 144 (2d Cir. 1996) ("A tacit understanding will suffice to show agreement for purposes of a conspiracy conviction. There need not be any written statement or even a speaking of words which expressly communicates agreement."). As to a defendant's participation, even "a single act may be sufficient for an inference of involvement . . . if the act is of a nature justifying an inference of knowledge of the broader conspiracy." *Huezo*, 546 F.3d at 180 (quoting *United States v. Tramunti*, 513 F.2d 1087, 1112 (2d Cir. 1975)) (internal quotation marks omitted).

Here, the evidence is ample that Mahender assisted his wife in bringing the maids to his home, that he did so to benefit from their labor, which he helped to direct, and that, knowing of his wife's threats and punishments, he aided her in meting

them out. This evidence provides more than a sufficient basis on which to conclude that there was a "tacit understanding" between Mahender and Varsha that the maids would be held in involuntary servitude and peonage in the Sabhnanis' home.

2. Other Convictions

As already noted, Mahender does not directly challenge the sufficiency of the evidence to support his convictions for document servitude and conspiracy to commit document servitude. Instead, he argues that, because the evidence was insufficient to support his forced labor and peonage convictions, he necessarily cannot be guilty of the "derivative" offense of document servitude. Mahender's Br. 64. Mahender's argument is based on a fundamental misreading of the document servitude statute. Section 1592 of Title 18 provides that "[w]hoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person" *either* "in the course of" a violation of one of a number of statutes, including the forced labor and peonage statutes, or "with the intent to violate" the same statutes, is guilty of a crime. 18 U.S.C. §§ 1592(a)(1)-(2). Mahender continually refers to this crime as an offense that is merely "derivative" of the forced labor and peonage crimes. This is incorrect: a defendant may be convicted under § 1592 for knowingly concealing immigration documents merely "with intent to violate" the forced labor or peonage statutes. 18 U.S.C. § 1592(a)(2).

In any event, we have already determined that Mahender's convictions for forced labor and peonage were supported by sufficient evidence. Here, the

evidence that Samirah's and Enung's passports and other immigration documents were kept in a locked cupboard in the closet adjacent to the Sabhnanis' master bedroom was ample. The jury could infer Mahender's knowing possession of Samirah's and Enung's passports and other immigration documents from the fact that his own passport was kept in the same cupboard, and from the closet's position in the house. Therefore, Mahender's convictions for document servitude and conspiracy to commit document servitude are supported by sufficient evidence.

Finally, without challenging the sufficiency of the evidence to support his conviction, Mahender suggests that his conviction for harboring illegal aliens should be vacated because the harboring statute, 8 U.S.C. § 1324(a)(1)(A), was not "designed" to cover a situation in which a defendant forces an alien who wishes to leave the country to remain here. Such conduct is "outside the scope" of the statute, which was only intended to criminalize conduct facilitating an alien's illegal presence in the United States. Mahender's Br. 64-65. Suffice it to say that the text of the statute cannot support such limitations. The statute renders guilty of a crime any person who, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." 8 U.S.C. § 1324(a)(1)(A)(iii). The statute does not attempt to distinguish among various reasons why an alien has "come to, entered, or remains" in the country illegally, nor does it distinguish among various motives a defendant might have for "concealing, harboring, or shielding" the alien. "[Sec-

tion] 1324, on its face, does not restrict the persons within its reach." *United States v. Kim*, 193 F.3d 567, 573 (2d Cir. 1999). We decline Mahender's invitation to read words into the statute that are not there.

III. The Refusal of Prosecution Witnesses To Speak to Defense Counsel

On cross-examination by Mahender's counsel, several of the prosecution witnesses, including Deborah Litras, admitted that they had refused to speak to defense counsel prior to the trial. In the jury instructions, the district court told the jury that defense counsel had acted properly in attempting to interview witnesses, but that the witnesses were also within their rights to refuse to speak:

> Also, you have heard testimony from witnesses that attorney Stephen Scaring [Mahender's trial counsel] asked to speak to them prior to their testimony. I instruct you that Mr. Scaring had a right to attempt to interview these witnesses before they took the stand. However, I also instruct you that these witnesses had a right to decline to speak to him. And no unfavorable inference should be drawn against them because of that declination.

Tr. 5005. Judge Spatt overruled the defense's objection to this instruction at the charging conference.

Appellants argue that the district judge's instruction that the jury could draw no unfavorable inference against prosecution witnesses from the fact that they refused to be interviewed by the defense was erroneous because it prevented the jury from evaluating a fact that went to the issue of witness

credibility. Absent the instruction, the Sabhnanis contend, the jury could have reasoned that because these witnesses refused to speak to defense counsel, they must have been biased against the Sabhnanis. Moreover, the Sabhnanis argue, the instruction may have cast Mahender's trial counsel in a negative light for even asking witnesses the question whether they had refused to speak to the defense prior to trial.

We review a claim of error in the content of jury instructions de novo. *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006). We have no difficulty concluding that there was no error in the instruction here. Mahender himself concedes that the instruction was correct insofar as it recognized that witnesses have a right to decline to be interviewed. *See, e.g.*, *United States v. Agostino*, 132 F.3d 1183, 1191 (7th Cir. 1997); *United States v. Miller*, 381 F.2d 529, 538 n.7 (2d Cir. 1967) ("While the Government is doubtless bound not to obstruct a defendant's access to a prospective witness, we know of no rule requiring the witness to submit to an interview."); *United States v. James*, No. 02 CV 0778(SJ), 2007 WL 914242, at *15 n.10 (E.D.N.Y. Mar. 21, 2007). The instruction did nothing more than inform the jury of this right and instruct that a witness does not act wrongfully by exercising it. The defense was still free to suggest — and did, through cross-examination and in summation — that the refusal to meet with defense counsel could suggest a witness's greater sympathy for or affiliation with the other side of the case.

Moreover, the jury was explicitly charged that it should evaluate the credibility of witnesses based on "the circumstances under which each witness testi-

fied" and "every matter in evidence that tends to show whether a witness is worthy of belief." Tr. 5011. Among these matters, the judge specifically instructed the jury that:

> How you choose to believe a witness may be influenced by *any* bias, resentment or anger that you may perceive the witness to have. Does the witness have a relationship with the government or a defendant that may affect how he or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth? Or does the witness have some bias, prejudice or hostility that may have caused the witness consciously or not to give you something other than a complete, accurate account of the facts?

Tr. 5012 (emphasis added). This charge clearly allowed the jury to take into account any bias a witness might have, including any bias resulting from a relationship with the government. Finally, we reject as meritless any claim that the instructions could fairly be read to cast aspersions on Mahender's trial counsel, given the court's explicit statement that counsel had every right to attempt to interview the prosecution's witnesses.

IV. The Defense's Motion to Re-Open Following the Commencement of Jury Deliberations

The Sabhnanis next contend that the district court abused its discretion in failing to grant their motion to reopen the proceedings after the jury had begun its deliberations in order to present newly discovered evidence of the alleged bias of a prosecution witness. After closing arguments, during which some of her testimony had been attacked by the de-

fense, prosecution witness Deborah Litras sent an e-mail to a family friend that read in relevant part as follows:

> I really do hope that the "theatrics" of the closing arguments by the defense will not sway the jury away from the right decision. The thing that scares me is that there never seems to be any justice in the world. I guess we'll just have to wait and see. I don't think it's going to be much longer. See 'ya. Deb.

Tr. 5150. The defense, upon discovering the e-mail, moved to reopen the case and to recall Litras for the purpose of questioning her about it. Defense counsel argued that the e-mail showed that Litras was biased in favor of conviction. The prosecution argued that the e-mail, fairly read, did not indicate a bias, but a desire for justice to be done, and also that it was irrelevant to any issue the jury was considering in that it principally expressed Litras's opinion of the closing arguments.

The district court denied the defense motion to reopen. The judge noted that the e-mail did not expressly state that Litras was biased in favor of conviction and that, in any event, her trial testimony was explicit that she "believed the maids' complaints." Tr. 5188. "It was obvious from [Litras's] testimony . . . that she favored the maids [and] felt sorry for the maids, and she was behind the maids in this case." *Id.* Because her testimony indicated that Litras "favor[ed] the maids over her own boss," Tr. 5189, and because the jury also heard evidence that she had refused to speak to defense counsel while meeting with the government several times, Litras's leanings were already clear. The court also noted that reopening the case solely for testimony regard-

ing the e-mail would create enormous practical difficulties and would be needlessly disruptive of the jury's deliberations. Finally, the court agreed with the prosecution that the e-mail was irrelevant to the question whether Litras was biased when she testified, and only reflected her "dismay . . . [at] the theatrics of the closing argument[s], which somewhat denigrated her." Tr. 5196.

We review a district court's determination whether to reopen a case after the jury has begun its deliberations for abuse of discretion. *See United States v. Crawford*, 533 F.3d 133, 138 (2d Cir. 2008); *United States v. Golomb*, 754 F.2d 86, 89 (2d Cir. 1985). In *Crawford*, we noted the factors that a district judge should consider in exercising this discretion:

> The court must consider the timeliness of the motion [to reopen], the character of the testimony, and the effect of granting the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not imbue the evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered.

Crawford, 533 F.3d at 138 (quoting *United States v. Nunez*, 432 F.3d 573, 579 (4th Cir. 2005)) (emphasis omitted). Considering the *Crawford* factors, timeliness cannot be counted against the appellants here,

as their counsel obtained Litras's e-mail only just before making the motion to reopen. Each of the other relevant factors, however, weighs against the Sahbnanis' position. We conclude based on these factors that the district court did not abuse its discretion.

At the start, the parties disagree about whether, in assessing the character of the evidence, we should construe it in the light most favorable to the defense. We need not resolve this question, however, because even viewing the e-mail and its potential effect in the Sabhnanis' favor, we conclude that the e-mail's significance did not merit reopening. We agree with the district court that to the extent the e-mail tended to show that Litras favored the maids, it was already obvious from her testimony that she believed the maids' stories of abuse and sympathized with them. Litras testified that she "felt sorry" for the maids, Tr. 3937, that she provided the maids with food surreptitiously and hid the evidence from the Sabhnanis, that she was "upset" after Samirah displayed her injuries, Tr. 3874, 3901, and that she was "glad" when she learned that Samirah had fled the Sabhnanis' home. Tr. 3969. Mahender contends that the e-mail would have corrected a misimpression created by the government that Litras, who suffered from cancer, was reluctant to testify because doing so would place her job and her health insurance in jeopardy. Despite her personal concerns, however, Litras made it abundantly clear to the jury that her sympathies were with the maids and that, for this reason, she was not a reluctant witness. The e-mail would thus have added very little to what the jury had already heard.

The district court also properly considered the practical difficulties that would be caused by stopping the jury's deliberations and recalling Litras to testify. The potential for such a course of events to give "distorted importance" to evidence that is of marginal significance is obvious: here, there was a real risk that the jury would be distracted in its deliberations from the main issues. *See Crawford*, 533 F.3d at 140-41 (collecting cases noting a presumption that the significance of evidence introduced after the jury has begun deliberating will be misconstrued). We conclude that the district court's reasons for denying the motion — that the e-mail was of little or no evidentiary value in the determination of the Sabhnanis' guilt, that it would not meaningfully add to what the jury already knew or could infer about Litras's leanings, and that the disruption that would ensue would outweigh any potential usefulness of the evidence to the jury — were sound. The district court did not err in denying the motion to reopen, much less abuse its discretion.

V. The Allegation of Juror Misconduct

About three weeks before the jury verdict, which was returned on December 17, 2007, a photographer for the *New York Daily News*, Stephen Barcelo, was sitting in his car in the parking lot of the federal courthouse in Central Islip, New York, where the trial was taking place, at about 5:00 p.m. His car was in the first row of parked cars, where Barcelo often parked in order to photograph the defendants and the lawyers in the case as they arrived and departed. On this occasion, Barcelo's car window was partially open. He observed a group of people leave the courthouse. Based on the time of day and the fact that he recognized some of them, he believed the group to be the Sabhnani jurors. Two women from

the group – women he did not recognize – passed by his car door, speaking inaudibly. A minute or two later, he heard from behind his car a woman's voice loudly saying the words "guilty, guilty" in a laughing manner. Barcelo was then facing forward in his car in a dark parking lot, and he did not see who made the statement. Barcelo related this incident to fellow photographer Mary McLaughlin of the *New York Post* and to a reporter from the *Daily News*, Richard Weir. Kieran Crowley, a reporter for the *New York Post*, overheard Barcelo's statements to McLaughlin and related them to Mahender's defense counsel on or about December 19 — two days after the jury verdict.

The Sabhnanis, contending that the incident demonstrated that the Sabhnani jurors had engaged in impermissible deliberations before the close of evidence, moved for a new trial pursuant to Fed. R. Crim. P. 33 and also for a hearing at which jurors would be required to testify. The district court held a hearing at which Barcelo appeared. Barcelo testified that because the parking lot was dark that night, he could not and did not recognize the two women as members of the Sabhnani jury, but merely assumed that they were. Moreover, Barcelo admitted that as of the day of his testimony, he probably couldn't identify any member of the jury because he did not regularly visit the courtroom during the trial, but mostly observed groups of people coming in and leaving the courthouse. Barcelo acknowledged that there were other people in the parking lot that evening, including spectators and jurors from other trials, and that, because he did not witness the conversation, he could not say for certain who made the statement "guilty, guilty" or even whether it was one of the two women he had initially seen. Barcelo stated he could

not hear any of the woman's other words – and so apparently could not say whether she was discussing a case, a movie, or her own failure to go to the gym. He could not identify her voice, or provide any additional context for her statement.

Judge Spatt denied the defense motion for a new trial and also the motion for a hearing that would include juror testimony. *See United States v. Sabhnani*, 529 F. Supp. 2d 384 (E.D.N.Y. 2008) (district court opinion denying motion for new trial and evidentiary hearing on juror misconduct). The judge accurately noted that Barcelo's evidence fell far short of establishing that any misconduct had occurred. The judge expressed doubt at Barcelo's ability to identify and recognize members of the Sabhnani jury in light of his testimony that he did not visit the courtroom for any significant period of time. *Sabhnani*, 529 F. Supp. 2d at 389. The court noted that Barcelo could not testify to the context in which the "guilty, guilty" statement was made, could not identify the person who made the statement, and had admitted during his testimony that he only assumed the speaker was a member of the *Sabhnani* jury. *Id.* at 389-90. Noting that the facts asserted were "vague and uncertain," the judge concluded that "the testimony and affidavits [were] insufficient to justify a further hearing with testimony from the jurors, and certainly not a new trial." *Id.* at 390. The judge further concluded that, even if the speaker had been shown to be a member of the *Sabhnani* jury and to have been referring to the case, "[o]ne juror's potentially out-of-context, single word comment, does not demonstrate that the jurors prematurely deliberated [and] does not demonstrate that the juror would be unreceptive to opposing arguments or that any juror failed to participate in deliberations in good

faith." *Id.* at 393. The judge noted based on his own observations that the *Sabhnani* jury had "carefully and intently followed all of the testimony and the presentation of the evidence with close attention." *Id.* at 391.

"We review a trial judge's handling of alleged jury misconduct for abuse of discretion." *United States v. Gaskin*, 364 F.3d 438, 463 (2d Cir. 2004). A trial judge has "broad flexibility" in responding to allegations of such misconduct, particularly when the incidents relate to statements made by the jurors themselves, rather than to outside influences. *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994). We have stated, moreover, that district judges should be particularly cautious in conducting investigations into possible jury misconduct after a verdict, and that such investigations are only warranted when there is "clear, strong, substantial and incontrovertible evidence, that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006) (quoting *United States v. Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)) (internal quotation marks omitted).

The tenuousness of the Sabhnanis' argument is self-evident from Barcelo's testimony, and we find no abuse of discretion in the district court's decision not to pursue this matter further. This case presents no "clear, strong, substantial and incontrovertible evidence" of juror misconduct, and accordingly the district court properly determined that no further inves-

tigation was merited and that the motion for a new trial should be denied. *See Vitale*, 495 F.3d at 197.[15]

VI. Sentencing Issues

The defendants challenge various aspects of their sentences, as well as the calculation of the amount of restitution to the victims and the scope of the property forfeiture. With regard to the Sentencing Guidelines issues, we review a challenged sentence for its procedural and substantive reasonableness under an abuse of discretion standard. *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008) (en banc). We review legal questions de novo, and we review the district court's factual determinations under a clear error standard. *United States v. Friedberg*, 558 F.3d 131, 133 (2d Cir. 2009). In assessing procedural reasonableness, we review, *inter alia*, whether the district court correctly calculated the applicable Guidelines range and whether it relied on any clearly erroneous factual findings. *Cavera*, 550 F.3d at 190; *see also Friedberg*, 558 F.3d at 133.

A. Double Counting

Varsha Sabhnani was sentenced to 132 months' imprisonment, which represented a sentence below her Guidelines range of 151 to 188 months. Varsha Sabhnani's Guidelines range was based upon her criminal history category of I, and two separate offense level calculations as to the two victims. For the offense level computation relevant to Samirah, the Guidelines imposed a base offense level of 22 pursu-

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[15] Given this conclusion, we need not address the district court's additional determination that, in any event, Federal Rule of Evidence 606(b) would prohibit jurors from testifying at the hearing the Sabhnanis sought.

ant to U.S.S.G. § 2H4.1. This base offense level was adjusted upwards two points for serious bodily injury, pursuant to § 2H4.1(b)(1)(B) and was also adjusted upwards four points for use of a dangerous weapon pursuant to § 2H4.1(b)(2)(A). Additional enhancements were imposed: three points for holding the victim for more than one year (§ 2H4. 1(b)(3)(A)), and two points for knowingly committing an offense involving a vulnerable victim (§ 3A1.1(b)(1)), yielding an adjusted offense level of 33. The calculation as to Enung amounted to 27, which in turn added one point to the total for the offenses against Samirah to yield a final adjusted level of 34.

Varsha Sabhnani challenges her sentence on the ground that the district court should not have imposed enhancements both for causing serious bodily injury and for using a dangerous weapon. The district judge imposed a four-point adjustment for use of a dangerous weapon based on the evidence that a number of such weapons were used in the commission of Varsha's crimes, including a knife, a rolling pin, and boiling water. Sentencing Tr. 10. Separately, the court determined that imposition of the "serious bodily injury" enhancement was proper because the jury had been charged and had found that Samirah and Enung had suffered serious bodily injury with respect to the harboring of aliens counts. According to Varsha Sabhnani, this amounted to impermissible double counting. For the following reasons, we disagree.

"Impermissible double counting occurs [under the Sentencing Guidelines] when one part of the guidelines is applied to increase a defendant's sentence to reflect the kind of harm that has already been fully accounted for by another part of the guide-

lines." *United States v. Volpe*, 224 F.3d 72, 76 (2d Cir. 2000) (quoting *United States v. Napoli*, 179 F.3d 1, 12 n.9 (2d Cir. 1999)) (internal quotation marks omitted). Multiple adjustments are properly imposed, however, "when they aim at different harms emanating from the same conduct." *Id.* As this Court noted in *United States v. Rappaport*, 999 F.2d 57 (2d Cir. 1993), enhancements are not duplicative when they reflect "different facets of the defendant's conduct," *Rappaport*, 999 F.2d at 60, or, as we put it in *Volpe*, when "[t]he . . . adjustments at issue . . . do not serve identical purposes, but rather address separate sentencing considerations," *Volpe*, 224 F.3d at 76.

Such is the case here. The conduct that would subject a defendant to the adjustment for use of a dangerous weapon does not necessarily subject that defendant to the enhancement for causing serious bodily injury, nor are the kinds of harms at which these adjustments are aimed identical. Here, the district judge based Varsha's "use of a dangerous weapon" adjustment on the evidence that she had employed implements such as a knife and boiling water against Samirah. Because the use of such weapons did not require Varsha Sabhnani also to inflict serious bodily injury on her victims, the substantial evidence that she did inflict such injury mandated a separate adjustment — involving no double counting — to take account of this separate harm. *Cf. United States v. Donelson*, 450 F.3d 768, 774 (8th Cir. 2006) (noting that harms caused by committing an offense while endangering multiple victims and by using a firearm in connection with another felony offense are separate, and therefore imposition of adjustments based on each was not impermissible double counting).

United States v. Hudson, 972 F.2d 504 (2d Cir. 1992), on which Varsha principally relies, is not to the contrary. In *Hudson*, the defendant drove his car directly towards two U. S. Marshals in an attempt to escape from them. *Id.* at 505. The district court found that the defendant's use of a car was the use of a dangerous weapon, and thus applied the base offense level for "aggravated assault" under the Guidelines rather than the base offense level for obstructing or impeding officers. *Id.* The court then, in addition, imposed a four-point adjustment pursuant to a Guidelines provision that allowed for adjustments in aggravated assault cases in which "a dangerous weapon . . . was otherwise used." *Id.* at 505-06; *see also* U.S.S.G. § 2A2.2(b)(2)(B). We vacated *Hudson*'s sentence because the use of the car was the only facet of the defendant's conduct that caused the district court to use the "aggravated assault" base offense level, and that same conduct was also the basis for its "dangerous weapon" adjustment. *Hudson*, 972 F.2d at 507. As we later observed in *Rappaport*, "[b]oth of these increases necessarily reflected the same facet of *Hudson*'s conduct." 999 F.2d at 61. By contrast here, the fact that Varsha Sabhnani used dangerous weapons in connection with her crimes was distinct from the fact that she also inflicted serious injury on her victims — neither aspect of her conduct necessarily implied the other. We conclude, therefore, that both were properly taken into account in setting her offense level.[16]

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[16] For substantially the same reasons we conclude there was no double counting, we also reject Varsha Sabhnani's claim that she was entitled to a "cumulative effects" departure. Varsha's Br. 57.

B. Vulnerable Victims Enhancement

Both defendants challenge the district court's enhancement of their sentences by two levels pursuant to the "vulnerable victim" enhancement of the Sentencing Guidelines, U.S.S.G. § 3A1.1(b)(1), which provides that "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels." U.S.S.G. § 3A1.1(b)(1). The application notes to the section prevent its application when the factors that made the victim unusually vulnerable are already incorporated into the guideline for the relevant offense. The Sabhnanis argue that Congress, in enacting the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000), considered the same factors that the judge relied on to conclude that Samirah and Enung were vulnerable victims in this case, and that U.S.S.G. § 2H4.1, the offense guideline for forced labor and for peonage, incorporates these factors. The district court therefore erred, they argue, in imposing the vulnerable victim enhancement. We disagree.

The district court made the following particularized findings with regard to whether Samirah and Enung were vulnerable victims:

> [T]hey were both native Indonesians; neither one spoke a word of English; had never been in the United States before; were totally dependent upon the defendants for their basic human needs of food, clothing and shelter; they never received any direct payment for services . . . and were therefore unable to support themselves.
>
> They actually couldn't even leave the house. They couldn't speak. They had no

> money. Additionally, they were threatened if they left, their family members would be harmed. They would be jailed. The defendants took their passports, visas and other documents, and kept them from the two women. They were in a situation where they had to accept these abusive conditions, of course because they had no alternative.

Sentencing Tr. 31-32. We review these factual findings only for clear error, *United States v. Patasnik*, 89 F.3d 63, 72 (2d Cir. 1996), which we do not find. It is also clear to us that these characteristics, particularly that the maids had never been to the United States, spoke no English, were entirely dependent on the Sabhnanis for basic necessities, and lacked any money and were not directly paid, made them "less likely to thwart the crime[s]" than the average person, *United States v. Kaye*, 23 F.3d 50, 54 (2d Cir. 1994) and "in need of greater societal protection," *United States v. Dupre*, 462 F.3d 131, 146 (2006) (quoting *United States v. Stover*, 93 F.3d 1379, 1387 (8th Cir. 1996)). We have emphasized both of these factors in considering the vulnerable victim adjustment in the past.

The application notes to § 3A1.1(b)(1) state that the term "vulnerable victim" means "a person (A) who is a victim of the offense of conviction . . . and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1(b)(1) cmt. app. n.2. The notes instruct that the enhancement should not be applied "if the factor that makes the person a vulnerable victim is incorporated in the offense guideline." *Id.* The notes cite as an example a hypothetical situation in which a

particular offense guideline provides an explicit enhancement for a specified factor — in such a situation, if that same factor would also serve to make the victim "unusually vulnerable," the vulnerable victim enhancement should not be applied unless there are other, additional factors that render the enhancement appropriate.[17] Plainly, then, when an offense guideline provides for an adjustment for a certain factor that also makes a victim "unusually vulnerable" — that is, that makes a victim less likely to be able "to protect himself from the crime," *Dupre*, 462 F.3d at 144 (internal quotation marks omitted), and in greater need of societal protection — a sentencing court should not apply the § 3A1.1(b)(1) enhancement due to that same factor. However, if the victims are characterized by additional factors not taken into account by an explicit reference in the applicable sentencing guideline, application of the § 3A1.1(b)(1) vulnerable victims enhancement is appropriate.

Here, the Sabhnanis do not (and could not) contend that the offense guideline that provided their base offense level, U.S.S.G. § 2H4.1, expressly incorporates any of the factors the district court relied on

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[17] The Application Note provides, in full:

> Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

U.S.S.G. § 3A1.1(b)(1) cmt. app. n.2

to conclude that Samirah and Enung were vulnerable victims. Instead, they claim that the guideline incorporates these factors *implicitly* because Congress, in enacting the versions of the criminal statutes under which the Sabhnanis were prosecuted, took into account the victim characteristics upon which the district court relied in applying the vulnerable victims enhancement. In this sense, the Sabhnanis contend that Samirah and Enung are not "unusually vulnerable," but rather the "prototypical victims Congress aimed to protect." Varsha's Br. at 64.

It is true that the VTVPA includes findings that persons with some of the same characteristics as Samirah and Enung are more likely to be victims of the crimes of forced labor, peonage, and document servitude. "Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable." VTVPA § 102(b)(5), 114 Stat. 1466 (codified at 22 U.S.C. § 7101(b)(5)). Victims, because they will "frequently [be] unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked" and because they are "often subjected to coercion and intimidation including physical detention and debt bondage" and "often fear retribution and forcible removal to countries in which they will face retribution or other hardship," often find it "difficult or impossible" to report crimes committed against them. *Id.* § 102(b)(20), 114 Stat. 1468. In the VTVPA, Congress increased the statutory maximum sentence for several existing crimes including peonage, and enacted new separate offenses, including the forced la-

bor and document servitude statutes at issue here. *Id.* §§ 112(a)(1)-(2), 114 Stat. 1486-89. Finally, Congress directed the Sentencing Commission to amend the Guidelines to "take all appropriate measures to ensure that [the Guidelines] and policy statements applicable to [trafficking offenses] are sufficiently stringent to deter and adequately reflect the heinous nature of such offenses." *Id.* § 112(b)(2)(A), 114 Stat. 1489-90 (codified at 22 U.S.C. § 7109(b)(2(A)).

While it is true that Congress made findings in the VTVPA that the victims of "trafficking" offenses would frequently possess particular characteristics making them vulnerable, and that this factor contributes to the "heinous nature" of such offenses, however, neither the texts of U.S.S.G. §§ 2H4.1 and 3A1.1(b) nor the relevant application notes — which are, after all, what we are construing — support the result the Sabhnanis urge. Indeed, as the Seventh Circuit has observed, the offense guideline pertinent to both forced labor and peonage, which the Sabhnanis identify as the "highest guideline driving [their] sentences," does not say anything about the vulnerability of the victim — and thus specifies no victim-related factor that, according to the application notes to § 3A1.1(b)(1), should therefore be excluded as the basis for a separate, vulnerable victim enhancement. *United States v. Calimlim*, 538 F.3d 706, 717 (7th Cir. 2008). Like the appellants in *Calimlim*, the Sabhnanis assert, in essence, that all victims of crimes like peonage and forced labor are vulnerable, and therefore that none are particularly so. We agree with the Seventh Circuit, however, that this is not the case: "[W]ith enough muscle, it would be possible to coerce a perfectly able-bodied, English-speaking, independent American citizen into forced labor." *Id.* Moreover, the Sabhnanis seek to engage

courts applying the vulnerable victims enhancement in a morass of guesswork regarding the extent to which particular characteristics of the victim have been considered by Congress and tacitly incorporated into criminal statutes and associated guidelines that facially make no mention of them. We decline this invitation and conclude that the vulnerable victim enhancement was properly applied in this case.

C. Calculation of the Amount of Restitution

In 18 U.S.C. § 1593, Congress provided for mandatory restitution to victims in cases of, among other things, peonage, forced labor, and document servitude. 18 U.S.C. § 1593(a). Specifically, the "order of restitution . . . shall direct the defendant to pay the victim . . . the full amount of the victim's losses." *Id.* § 1593(b)(1). The statute defines the "full amount of the victim's losses," in pertinent part, as "the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)" 18 U.S.C. § 1593(b)(3). Here, the district court consulted the Fair Labor Standards Act's (FLSA) minimum wage and overtime provisions, 29 U.S.C. §§ 206 and 207, and determined minimum wage rates for the period of Samirah's and Enung's labor, which it multiplied by a statutorily determined factor to calculate overtime pay. The court performed its calculations on the basis that the maids worked 24 hours per day when the Sabhnanis were at home, and eight hours per day when the Sabhnanis left the country during the summer months. The court subtracted the money that had actually been paid to the victims' families in Indonesia. Finally, it doubled the total award pursuant to 29 U.S.C. § 216, which allows for double damages for employers who violate the FLSA's minimum wage and overtime provisions.

Based on these calculations, the district court awarded $620,743.82 to Samirah and $315,802.40 to Enung.

The Sabhnanis raise three separate challenges to these awards on appeal. First, they argue that the district court erred in finding that Samirah and Enung were entitled to overtime pay because the court failed properly to apply a statutory exemption to FLSA for payment of overtime to domestic servants who reside in their employer's household. Second, they argue that the district court should have conducted an evidentiary hearing to determine the exact number of hours the victims worked, and that the court clearly erred in calculating the award based on a determination that the victims worked 24-hour days. Finally, they argue that the district court erred in awarding liquidated damages pursuant to 29 U.S.C. § 216(b). We agree that the district court erred in awarding overtime pay, and thus we vacate the restitution award and remand for recalculation. We conclude, however, that the district court was within its discretion not to hold an evidentiary hearing and that it did not err in awarding liquidated damages.

1. The Applicability of the FLSA Overtime Provisions

Pursuant to 29 U.S.C. § 207, and with regard to covered employees, "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half time the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Congress extended this maximum hours provision to domestic workers in 1974.

Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 123 (2d Cir. 2004), *vacated on other grounds*, 546 U.S. 1147 (Mem.) (2006). However, 29 U.S.C. § 213(b)(21) provides that Section 207 "shall not apply with respect to . . . any employee who is employed in domestic service in a household and who resides in such household." 29 U.S.C. § 213(b)(21). The Sabhnanis argue that this exemption to Section 207 applies to Samirah and Enung and thus that the district court's restitution award, which was calculated using the overtime provision, was erroneous. The government argues that the exemption does not apply on the theory that Samirah and Enung did not reside with the Sabhnanis because the Sabhnanis "failed to provide, among other things, appropriate living quarters, adequate sleeping facilities and adequate meals." Gov't's Br. 127. It is undisputed that Samirah and Enung were "employed in domestic service in a household" under 29 U.S.C. § 213(b)(21); the only question is whether they were employees who "resided" in the Sabhnanis' home.

"Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there." *United States v. Venturella*, 391 F.3d 120, 125 (2d Cir. 2004) (quoting *Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004)) (internal quotation marks omitted). We interpret the unambiguous terms of statutes according to their ordinary and plain meaning. *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms." (citation omitted)).

To "reside" generally means "[t]o dwell permanently or for a considerable time; to have one's settled or usual abode; to live, in or at a particular place." *Oxford English Dictionary* (2d Ed. 1989). In *Venturella*, we noted that the term "resides" in its normal use "denotes residence." *Venturella*, 391 F.3d at 125 (citing *Webster's Third New Int'l Dictionary* 1931 (2000); *United States v. Namey*, 364 F.3d 843, 845 (6th Cir. 2004)). Other courts have also determined that whether one "resides" in a place, in the natural and ordinary sense of the phrase, refers to whether one lives there and makes one's permanent or semi-permanent home in that place. *See, e.g.*, *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1016 (8th Cir. 2006); *Gusewelle v. City of Wood River*, 374 F.3d 569, 577 (7th Cir. 2004) (city rules requiring employees to "reside" within city limits meant employees must maintain their "primary residence" there); *see also Rosenruist-Gestao E Servicos LDA v. Virgin Enters. Ltd.*, 511 F.3d 437, 450 (4th Cir. 2007) (Wilkinson, J., dissenting) (noting that dictionary meaning of a witness "residing" in a judicial district for purposes of 35 U.S.C. § 24 is that the witness "dwell[s] permanently or for a considerable time" there). This meaning is even used when such "residence" is involuntary, as in the case of one residing in a prison. *See, e.g.*, *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (describing claim of protected liberty interest in "continuing to reside in the general prison population"), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472, 483 & n.5 (1995).

Because there is no doubt that Samirah and Enung lived in the Sabhnanis' house and did so as permanent residents for a considerable time, we conclude that the maids were "employee[s] who [were] employed in domestic service in a household and who

reside[d] in such household" for the purpose of the § 213(b)(21) exemption. *See, e.g.*, *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 381, 388 (E.D.N.Y. 2002) (finding that live-in domestic servant was covered by § 213(b)(21) exemption); *see also Almeida v. Aguinago*, 456 F. Supp. 2d 505, 506, 508 (S.D.N.Y. 2006) (plaintiff live-in domestic servant conceded, and court agreed, that § 213(b)(21) exemption applied). The sources relied on by the government to argue against this construction of Section 207 are both unpersuasive and inapplicable.

The government points to an Opinion Letter of the Department of Labor that interpreted, in the context of a different regulation, what it means for an employee to "reside[] on his employer's premises . . . for extended periods of time." Opinion Letter Fair Labor Standards Act (FLSA), 1981 WL 179033 (Dep't of Labor, Feb. 3, 1981) (hereinafter "FLSA Opinion Letter") (quoting 29 C.F.R. § 785.23). The letter determined that the employees in question, who were employed as "houseparents" in a privately-owned community for the developmentally disabled and who stayed overnight at the facilities for five or six days in a row, were "residing" at their employer's premises notwithstanding the fact that the employees maintained their own private residences. *Id.* "Where the facilities offered by the employer provide a home-like environment with private quarters separate from the residents of the group home," according to the FLSA Opinion Letter, the employees should be regarded as residing there (meaning that they need not be paid for hours spent on their own in the private quarters) on the theory that "[i]n light of the amount of time they spend at the group home, it is in effect a second residence." *Id.*

The government claims that under this interpretation, the maids were not "residing" in the Sabhnanis' house because they were not provided with "a home-like environment with private quarters." Nothing about the FLSA Opinion Letter, however, suggests that it was an interpretation of what it means to "reside in [a] household" for purposes of § 213(b)(21). Indeed, it is clear in context that the letter is attempting to answer an entirely different question from the one posed by this case: whether an employee with his or her *own* private residence can *also* "reside" at the employer's premises. The letter's answer to this question tells us very little about whether, on the facts of this case, Samirah and Enung, who had nowhere else to go, were employees who "resided" in the Sabhnani household. Nor does it purport to suggest, at least with regard to domestic service, that it is *only* when an employee has private quarters separate and apart from the area where he or she works that this employee should be regarded as residing at the employer's premises — a circumstance that, in any event, provides a somewhat arbitrary basis for distinguishing among domestic workers who live in their employers' homes and who argue that they are entitled to overtime pay. The FLSA Opinion Letter thus gives us no cause to doubt our interpretation of § 213(b)(21). For the same reasons, we find the cases relied on by the government that apply the Opinion Letter (again to facts not similar to those in this case) inapposite. *See, e.g.*, *Chao v. Jasmine Hall Care Homes Inc.*, No. 2:05-cv-1306, 2007 WL 4591438, *2-3 (E.D. Cal. Dec. 28, 2007).

We therefore vacate the restitution award and remand for recalculation. We note, however, that although § 213(b)(21) prevents the calculation of resti-

tution from being based on an entitlement to overtime, "this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked." 29 C.F.R. § 552.102(a). We find for the reasons set forth below that the district court did not abuse its discretion in awarding 24 hours per day's worth of pay for the days on which the Sabhnanis were present in the house, and that the awarding of double damages was proper. Accordingly, the new award need not deviate from those aspects of the original.

2. The District Court's Decision Not To Hold an Evidentiary Hearing

Contending that factual issues regarding the appropriate amount of restitution were in dispute, the Sabhnanis sought to examine Samirah and Enung at an evidentiary hearing before the district court to determine, among other things, the number of hours that they worked. The district court denied this request, noting that in their extensive trial testimony, Samirah and Enung had "covered substantially all the subjects raised by the Defendants" in their objections to the proposed restitution. *United States v. Sabhnani*, 566 F. Supp. 2d 139, 146 (E.D.N.Y. 2008) (District Court restitution opinion). On appeal, the Sabhnanis argue that the district court's failure to hold an evidentiary hearing permitted the government to obtain a restitution award without proving the correct amount of loss and deprived the defendants of their ability to challenge the government's calculations. We disagree.

We have noted, in the context of contested issues regarding the propriety of a restitution award, that the sentencing procedures employed to resolve such disputes are within the district court's discretion so

long as the defendant is given an adequate opportunity to present his position: "[T]he district court is not required, by either the Due Process Clause or the federal Sentencing Guidelines, to hold a full-blown evidentiary hearing in resolving sentencing disputes. . . . All that is required is that the court afford the defendant some opportunity to rebut the Government's allegations." *United States v. Maurer*, 226 F.3d 150, 151-52 (2d Cir. 2000) (per curiam) (quoting *United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996)) (internal quotation marks omitted). In *Maurer*, we concluded that the district court did not abuse its discretion in failing to hold an evidentiary hearing, observing that "the trial record shed substantial light" on the issues in dispute, and that the district court provided the defendant with multiple opportunities to make arguments regarding the award. *Id.* at 152.

Here, the trial testimony made very clear that so long as the Sabhnanis were present, none of the maids' time was truly their own. Both Samirah and Enung offered unrefuted testimony that they performed household work between 4:00 a.m. and late at night seven days a week. The evidence also established that Varsha sometimes gave out tasks that required the whole night to accomplish. Samirah testified that she was deprived of sleep, sometimes sleeping only two hours in a 24-hour period. Samirah testified that she never left the house alone, and Enung testified that she "didn't dare" leave the house due to Varsha's threats. Tr. 3188. Neither testified that any of their time, apart from the periods during which the Sabhnanis left the country for the summer, was free from responsibility.

The Sabhnanis, contrary to their position here, were not denied an opportunity to challenge the government's proposed calculation of the restitution award. In addition to considering sentencing memoranda, the district court held a hearing on July 11, 2008 at which the issue of restitution was addressed. At this hearing, the defendants were not permitted to examine the maids, but they did cross examine the government's witness from the Department of Labor who performed the calculations on which the government based its proposed award. The Sabhnanis thus had ample occasion to challenge this witness's knowledge of the facts of the case and the basis for his figures.

We conclude that the defendants were "afforded an adequate opportunity to argue [their] position" and that the district court did not abuse its discretion in declining to hold a full evidentiary hearing. *Maurer*, 226 F.3d at 152. "In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties." 29 C.F.R. § 552.102(a). Here, the trial record established that there was no "agreement" between the Sabhnanis and the maids as to periods of free time. To the contrary, the testimony was that at no time were Samirah and Enung afforded "periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits." *Id.* The trial testimony further demonstrated that the maids did not habitually get "a reasonable night's sleep"; in such cases, Department of Labor regulations suggest that "the entire [sleeping] period" should be counted towards the number of hours

worked. 29 C.F.R. § 785.22. The district court did not err, much less abuse its discretion, in concluding that the trial record shed substantial light on the number of hours worked and that a full hearing was unnecessary.

3. The District Court's Award of Liquidated Damages

Pursuant to 29 U.S.C. § 216(b), the district court calculated a "net back pay" figure for each of the maids and then doubled this figure to arrive at each maid's total award. Section 216(b) of the FLSA provides that "[a]ny employer who violates [§§ 206 and 207] . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The Sabhnanis argue that the § 216(b) liquidated damages provision does not apply to restitution awards under 18 U.S.C. § 1593. We disagree.

Section 1593 provides that a sentencing court shall order restitution in the "full amount of the victim's losses," which the statute defines to include "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)." 18 U.S.C. § 1593(b)(3). The question here is whether § 216(b)'s provision for liquidated damages counts as part of the "value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act." *Id.* We think it does.

Three points are significant about the statutory language. First, § 1593's reference to FLSA does not

limit the "minimum wage and overtime guarantees" that determine the "value" of the victim's labor solely to §§ 206 and 207, the specific provisions of FLSA setting out the definitions of minimum wage and overtime and when they apply. This suggests that statutory provisions other than §§ 206 and 207 are relevant in determining what FLSA's "minimum wage and overtime guarantees" are.[18] Second, § 216(b)'s double damages provision is triggered automatically by a violation of §§ 206 or 207, so that an employer who violates these provisions "*shall be liable* to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (emphasis added). Third, § 216(b) is explicitly and exclusively tied to violations of the minimum wage and overtime rules in §§ 206 and 207.

These points strongly suggest to us that the "value of the victim's labor as guaranteed under the minimum wage and overtime guarantees [of FLSA]," for the purposes of 18 U.S.C. § 1593, includes the liquidated damages mandated by § 216. The Sabhnanis have one principal argument to the con-

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[18] Indeed, the value of the victim's labor "as guaranteed under [FLSA's] minimum wage and overtime guarantees," 18 U.S.C. § 1593(b)(3), requires reference to § 216(b) itself, because it is this provision that by its terms guarantees to the employee not only liquidated damages, but the minimum wages and overtime compensation that an employer has failed to pay. 29 U.S.C. § 216(b) (noting that any employer who violates §§ 206 and 207 "shall be liable to the employee" for unpaid minimum wages, unpaid overtime compensation, and liquidated damages).

trary. Section 260 of FLSA provides that when an employer shows that the conduct giving rise to a FLSA violation was undertaken in good faith and that he had reasonable grounds for believing that his conduct was not unlawful, "the court may, in its sound discretion" lessen or dispense with the liquidated damages award. 29 U.S.C. § 260. Based on this provision, the Sabhnanis contend that a liquidated damages award is not part of the value of the victim's labor that FLSA guarantees, but is in the nature of a penalty imposed on some employers for willful non-compliance.

This argument is without merit. As we have said with regard to FLSA's liquidated damages provision in the past, "[l]iquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving wages due caused by the employer's violation of the FLSA." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999); *see also Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (noting that FLSA's liquidated damage provision "is not penal in nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate"); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942) (same). The possibility that a judge may in narrow circumstances relieve an employer of its obligation to pay alters neither Section 216's general command that liquidated damages be paid nor our repeated recognition that these damages count as compensation. *See Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (noting that FLSA's liquidated damages "are considered compensatory rather than punitive"); *see also Her-*

man, 172 F.3d at 142 ("double damages [are] the norm and single damages the exception").

Finally, the defendants argue, citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988), that they are entitled to a jury trial before liquidated damages may be awarded. In *Brock*, this Court determined that in suits by the Secretary of Labor or an employee for back wages and liquidated damages under 29 U.S.C. §§ 216(b) and (c), an employer is entitled to a jury trial on the issue of the amount of back pay due pursuant to the Seventh Amendment. *Brock*, 840 F.3d at 1063 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 & n.7 (1978)). Suffice it to say that the issue of whether an employer has a Seventh Amendment right to a jury in a civil case in which an employee or the government is seeking back pay and liquidated damages is analytically distinct from the question whether a criminal defendant who is required by statute to pay restitution is entitled to a jury trial under the Sixth Amendment on the amount of restitution due. This court has already held that the answer to the latter question is "no" in the context of awards made pursuant to other restitution statutes. *See United States v. Tin Yat Chin*, 476 F.3d 144, 147 (2d Cir. 2007); *United States v. Reifler*, 446 F.3d 65, 118-19 (2d Cir. 2006). We see no reason why these decisions should not apply here. For these reasons, the award of liquidated damages was proper. On remand, in calculating the new restitution award, the district court may award liquidated damages pursuant to FLSA § 216.

D. Property Forfeiture

After the jury returned its verdict as to the criminal charges, the government sought forfeiture of the Sabhnani's home pursuant to 18 U.S.C.

§§ 1594 and 982(a)(6)(A). Section 1594 provides, in relevant part:

> (d) The court, in imposing sentence on any person convicted of [an involuntary servitude offense] shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States --
>
> > (1) such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation . . . .
>
> (e)(1) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> > (A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.

Section 982(a)(6)(A) further provides:

> The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate [*inter alia*, the harboring offense] . . . if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law--
>
> . . .
>
> (ii) any property real or personal --
>
> > . . . (II) that is used to facilitate, or is intended to be used to facilitate, the com-

> mission of the offense of which the person is convicted.

Pursuant to Fed. R. Crim. P. 32.2(b)(1), the district court determined that the entire house, including Mahender's attached office, was subject to forfeiture. After being charged, the jury deliberated and found as to both defendants that the government had proven by a preponderance of the evidence that the house was used "to facilitate the commission" of each of the crimes of which the Sabhnanis had been convicted.

Mahender raises two challenges to the forfeiture. First, he argues that the government did not prove that his office, which is annexed to the house, was used to facilitate the commission of the crimes and thus was subject to forfeiture. Second, he argues that the forfeiture of his interest in the home was grossly disproportionate to his culpability in the underlying crimes, and thus violated the Excessive Fines Clause of the Eighth Amendment. We review de novo a district court's legal conclusions regarding forfeiture. *United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007). We review its factual conclusions for clear error. *United States v. Gaskin*, 364 F.3d 438, 462 (2d Cir. 2004).

1. Mahender Sabhnani's Statutory Challenge to the Forfeiture of the Office

Mahender makes two points with regard to the forfeiture of his office. First, he argues that the jury was improperly instructed that the forfeiture statutes allow for forfeiture of property even if only part of the property was used to commit or facilitate the crimes. Second, he argues that his office was outside the scope of the applicable forfeiture statutes because it was not part of "the actual property" used to

commit or to facilitate the Sabhnanis' offenses. Mahender's Br. 83.

We, like the district court, reject the premise of Mahender's argument — specifically that the office is a separate piece of property from the house itself and that the district court therefore should have determined separately whether it was subject to forfeiture. The office is not detached or separate from the house, and it is not separately owned; nor does it have a separate address. *United States v. Sabhnani*, 566 F. Supp. 2d 148, 156-57 (E.D.N.Y. 2008) (district court's forfeiture opinion). There is no separation of the office from the main house, as it is accessible directly from a kitchen within the house. The only evidence in the record that would arguably support the contention that the office is "separate" property is Deborah Litras's statement that the office is accessible via a separate entrance from the outside of the residence. Litras went on to testify, however, however, that the office can be accessed from the house by a single door. The district court did not err, therefore, in submitting to the jury the question whether the house as a whole was subject to forfeiture.

Even if we accepted Mahender's invitation to subdivide the parts of the Sabhnanis' house and determine whether each of them was separately subject to forfeiture, moreover, we have no difficulty concluding that the office was "used or intended to be used to commit or to facilitate the commission of" the crimes. 18 U.S.C. § 1594(d)(1). Under Fed. R. Crim. P. 32.2, the court may determine whether a property is subject to forfeiture "based on evidence already in the record," Fed. R. Crim. P. 32.2(b)(1)(B), including testimony at the earlier trial. The testimony at trial establishing that Samirah and Enung cleaned the

bathroom of the office on Mahender's instructions, washed the office floor, and served Mahender drinks in the office, demonstrates that some of the labor the maids were forced to do took place in the office. Moreover, because the maids were "concealed" within the residence and they entered the office on occasion, the office was also used to "conceal" them in violation of the harboring statute. Consequently Mahender's office was used to commit the crimes at issue, and it was properly included in the forfeiture.

2. Mahender Sabhnani's Constitutional Challenge to the Forfeiture

Mahender next argues that forfeiture of his entire interest in his home is in gross disproportion to his role in the crimes, in violation of the Eighth Amendment's prohibition of excessive fines. U.S. Const. amend. VIII. In evaluating such a claim, we determine whether the forfeiture is "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334(1998).[19] We do so by considering "(1) the harshness . . . of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of per-

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[19] Although not all forfeitures are "fines" for the purpose of the Excessive Fines clause, those that can be characterized as punitive are "fines" subject to the limitations of the Eighth Amendment. *See Austin v. United States*, 509 U.S. 602, 609-10 (1993) (noting that Excessive Fines Clause limits the government's ability to extract payments as punishment for an offense, whether those payments are sought in civil or criminal proceedings); *see generally von Hofe v. United States*, 492 F.3d 175, 181-82 (2d Cir. 2007)

sons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant." *von Hofe v. United States*, 492 F.3d 175, 186 (2d Cir. 2007) (citing *Bajakajian*, 524 U.S. at 337-40). The district court, in rejecting Mahender's constitutional challenge, found that the "essence" of the defendants' crimes was the "harboring [of] illegal aliens and forcing them to perform domestic labor." *Sabhnani*, 566 F. Supp. 2d at 155. The court determined that the Sabhnanis were clearly within the class of persons for whom the statutes at issue were designed, and that the statutes carried with them the possibility of severe punishment and large fines. *Id.* The trial testimony demonstrated, moreover, that the crimes of the defendants, all of which took place within the Sabhnani residence, caused great harm to the victims. *Id.*

Relying on *von Hofe*, Mahender argues on appeal that because he was less culpable for the crimes than was Varsha, the forfeiture of his interest in their jointly-owned home was excessive. In *von Hofe*, a husband and wife were convicted of state law offenses related to the growing of 65 marijuana plants in their shared residence, and the federal government thereafter sought forfeiture of the home. *von Hofe*, 492 F.3d at 179. The only crime to which Mrs. von Hofe pled guilty was possession of a controlled substance under Connecticut state law, while her husband pled guilty to manufacturing and distributing such substances. *Id.* We agreed with the district court that forfeiture of the husband's interest in the home did not violate his rights under the Excessive

Fines Clause, *id.* at 186, but we reversed the forfeiture judgment as to his wife, *id.* at 188. Stating that Mrs. von Hofe bore "minimal blame for the criminal activity" that occurred at the house, we noted that there was no evidence in the record of her use of drugs or involvement in any way in the growing of the marijuana. *Id.* Indeed, there was no evidence that she even knew that marijuana was being trafficked out of her home. *Id.* at 188-89

We find *von Hofe* easily distinguishable. As we have already discussed, the trial testimony is clear that Mahender both knew of the criminal conduct taking place inside his residence and participated in it. This distinguishes *von Hofe*, in which we found it significant to her level of culpability that Mrs. von Hofe neither knew of the drug trafficking nor in any way "encouraged or promoted" it. *Id.* at 188. In *United States v. Collado*, 348 F.3d 323 (2d Cir. 2003), we rejected a constitutional challenge to a forfeiture action against a building owner who was "willfully blind" to the drug trafficking taking place in her building. *Collado*, 348 F.3d at 327-28. Suffice it to say that if willful blindness is a sufficient level of culpability to justify a property forfeiture, Mahender's willful participation in the crimes taking place in his home fully supports the forfeiture judgment here. *See also United States v. Milbrand*, 58 F.3d 841, 848 (2d Cir. 1995) (forfeiture of mother's interest in farm on which son conducted marijuana trafficking was not excessive because evidence demonstrated that she must have known of criminal conduct taking place there). Given the evidence on which the jury relied to convict Mahender of the underlying criminal charges, there was nothing "grossly disproportionate" about the forfeiture of his interest

in the house, and thus the forfeiture did not violate the Excessive Fines Clause.

CONCLUSION

For the foregoing reasons, we vacate the restitution award and remand for recalculation. We affirm the district court's judgments in all other respects. In light of the fact that we affirm on all issues related to the guilt and sentence of Mahender Sabhnani, he is ordered to surrender on April 5, 2010 to begin serving his term of incarceration. Mahender Sabhnani's current conditions of release on bail pending appeal will remain in effect until such time as he surrenders.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

VARSHA MAHENDER SABHNANI and MAHENDER MURLIDHAR SABHNANI,

Defendants.
---------- X

MEMORANDUM OF DECISION AND ORDER
07-cr-429 (ADS) (WDW)

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SPATT, District Judge.

Presently before the Court are motions by Varsha Mahender Sabhnani ("Varsha") and Mahender Murlidhar Sabhnani ("Mahender") (collectively, the "Defendants" or the "Sabhnanis") for judgments of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."). Also before the Court is a motion by Varsha for a new trial pursuant to Fed. R. Crim. P. 33. The Government opposes the motions.

I. BACKGROUND

A. The Indictment

On May 22, 2007, the Defendants were indicted and charged with two counts of forced labor and two counts of harboring aliens in relation to their alleged treatment of two domestic servants from Indonesia, named Samirah and Enung. On September 18, 2007, pursuant to a superseding indictment, the Defendants were charged with: (1) conspiracy to commit forced labor; (2) two counts of forced labor; (3) conspiracy to harbor aliens; (4) two counts of harboring aliens; (5) conspiracy to commit peonage; (6) two counts of peonage; (7) conspiracy to commit document servitude; and (8) two counts of document servitude.

B. The Trial Testimony

On October 29, 2007, the trial commenced. Over the course of the seven week trial, the jurors heard testimony from various witnesses including law enforcement personnel and an employee of the Defendant Mahender. Most importantly, the jurors heard testimony from Samirah and Enung. Although this Court will not now review all of the testimony from this lengthy trial, the Court will discuss the testimony that is relevant to the Defendants' post-trial motions.

Samirah and Enung traveled to the United States from Indonesia to work as domestic servants in the Sabhnani home. In 2002, Mrs. Joti, Varsha's mother, escorted Samirah to the United States. The Defendants met Samirah and Mrs. Joti at the airport and escorted them to the Sabhnani home. Varsha took Samirah's passport and did not return it until April 2007, one year after its expiration. Similarly,

Enung arrived in the United States in 2005, escorted by Varsha's sister and brother-in-law. Enung was also met at the airport by Varsha and Mahender. Varsha's sister gave Enung's passport and visa to Varsha. Subsequently, during an authorized search, Enung's documents were found locked in a cabinet in the Sabhnanis' bedroom closet. (Tr. 1048-49,1283-84, 1352, 1681, 1745-49, 2070, 3036, 3047).

Mahender owns a perfume export company and his office was originally located in the Sabhnani home, but then moved to an office physically annexed to the home. Therefore, in reality, Mahender worked at home on a daily basis.

Samirah and Enung do not speak or understand English. During the trial, through interpreters, Samirah and Enung testified regarding their duties; work schedules; and the abuse they suffered. Among other abuses, they testified that they worked from four a.m. through midnight seven days a week; slept on the floor of a kitchen; had no regular days off; and had no contact with outsiders. Further, they testified that they did not have enough food and were forced to eat from the trash. (Tr. 1759, 1760-61, 1823-33, 1828, 1830-31, 1840-42, 2035, 3063-64, 3080-81, 3095). Even more serious abuse occurred to Samirah and Enung, as will now be related.

1. As to the Evidence of Varsha's Conduct

Samirah testified, at length, regarding the abuse she suffered at the hands of Varsha. She testified that the Defendants did not provide her with a sufficient amount of food, and that, out of hunger, she drank milk directly from a container. She further testified that Varsha beat her as punishment for drinking the milk and photographed her drinking milk from the container, threatening to send the

photograph to her family to prove she was a thief. In fact, Varsha kept the photograph in a locked cabinet in the Defendants' bedroom closet. Samirah further testified that Varsha beat her upon learning that she ate food from the trash and fell asleep.

Samirah testified to even more serious acts by Varsha. Samirah described her abuse in detail, informing the jury that Varsha pulled her ears with fingernails until they bled; threw boiling water on her; cut her with a knife; hit her; pinched her; forced her to strip her clothes off; shaved her pubic hair; wrapped her in cellophane; forced her to eat chili peppers; and forced her to eat her own vomit. In addition, Samirah testified that Varsha cut off the hair on her head; compelled her to wear eyeglasses that were fastened with a rubber band and covered with tape; and forced her to wear rags. She further testified that the rags she wore were used to clean the floor and that parts of her body were uncovered because she was not permitted to wear undergarments. In addition, when Varsha beat her, she was so frightened, she was unable to control her bladder and urinated on the floor. (Tr. 1048-54, 1064-65, 1311-12, 1761-1821, 1848-49, 1855, 1880-85, 2021).

In addition, Samirah testified that Varsha threatened to hurt her and her children if she ran away. She asked Varsha to send her back to Indonesia, but was told that in order to go back, she would have to pay the Defendants 100 million rupiahs. (Tr. 1809, 1880-85).

Enung also testified to abuse by Varsha. Enung testified that Varsha hit her on three occasions. In 2005, Varsha hit her in the face while wearing a large ring on her finger. Varsha also hit her with a metal spoon and a glass dish. In addition, Varsha

threatened to have Enung's husband in Indonesia arrested if she ran away and told her that the police would shoot her if she left the Sabhnani house. (Tr. 3083-86, 3089-90, 3187-88, 3512).

Enung testified at length about Varsha's treatment of Samirah. Specifically, Enung testified that Varsha abused Samirah by pouring boiling water on her; cutting her; hitting her with various objects; forcing her to eat chili peppers; attempting to force her to drink Windex; forcing her to strip off her clothes and covering her in tape; and cutting off her hair. Strangely, Enung testified that she did not remember if she had ever personally cut Samirah. In addition, both Samirah and Enung testified that Varsha threatened to kill them. Further, Enung testified that although Varsha threw out the rags that Samirah wore, Samirah retrieved the rags from the trash and continued to wear them. (Tr. 1785-87, 1790-91, 1794-95, 3180-85, 3129-37, 3189-96, 3155-56, 3253-55, 3460-61, 3507, 3555, 3576).

As stated above, many of the facts testified to by Samirah, regarding her abuse, were corroborated by Enung. In addition, other witnesses testified regarding events that they witnessed in the Sabhnani home, further corroborating the testimony by Samirah and Enung. Most notably, Deborah Litras, the export manager for Mahender's company, who worked in the home office with Mahender, and was still in his employ at the time of the trial, further corroborated the facts alleged by Samirah and Enung. Litras testified that she secretly mailed a letter for Samirah to her children in Indonesia and deleted the return address because she did not know if the Defendants permitted Samirah and Enung to send letters home. Litras also testified that Samirah

and Enung dressed in "torn or tattered type clothing." Litras bought food for Samirah and Enung, including donuts and muffins, but removed the wrappers so the Defendants would not find out. Litras testified that she felt sorry for them and "was glad" when she found out that Samirah ran away. (Tr. 2050-64, 3834, 3842-48, 3853-57, 3878-79, 3881-84, 3947, 3966, 3968-69).

Litras further testified that Samirah and Enung demonstrated to her that Varsha forced Samirah to eat chili peppers and hit her. Samirah also took off her hat, showing Litras that her hair was "all cut up, chopped up." Samirah showed Litras a "big gash behind her right ear" and a bruise on her left shoulder. Litras further testified that on another occasion, she saw Samirah with "blood coming down her face from her hairline," crouching at the door to Mahender's office. She also saw a smudge of Samirah's blood on the door. (Tr. 3858-74, 3860-71, 3885-93, 3940-44).

William Hespeler, an electrician who worked in the Sabhnani home, testified that he witnessed Samirah wearing "raggedy clothes." In addition, Anthony Pascarella, the Sabhnanis' gardener, testified that he gave food to Samirah and Enung, including donuts, chicken and bread, who were wearing "old" clothes. (Tr. 3586, 3643-48, 3653-54).

2. As to the Specific Evidence of Mahender's Conduct

Mahender accurately notes that both Samirah and Enung testified that he was "nice" or "good". However, that view was not precisely accurate. Samirah also testified that "[t]he mister is nice, not as mean as the missus." (Tr. at 2367). In addition, Samirah testified that when Varsha beat her, no one else was present, and Enung testified that when

Samirah was beaten, Mahender was not home. Further, they testified that Mahender was not present when Samirah was forced to eat hot chili peppers or was stripped naked. In addition, they were unable to communicate with Mahender because he did not speak Indonesian. Mahender also notes that defense witnesses testified that they did not observe injuries to Samirah when they were present in the Sabhnani home. (Tr. 1776-77, 1794, 1846-48, 1870, 1883, 2052, 2370, 3131, 3241, 3402).

However, Samirah testified that although Mahender was not present during the beatings, afterwards Mahender did see her face swollen. The trial testimony further revealed that when Samirah and Enung arrived in the United States, Mahender and Varsha both met them at the airport. Further, Samirah testified that Mahender observed her eating food from the trash and on another occasion, sleeping in the bathroom. According to Samirah, Mahender reported both events to Varsha, who then "immediately hit" her. In addition, Samirah testified that Mahender scolded her and took her "to clean another person's home." Mahender also saw Samirah wearing rags. Notably, Enung testified that Varsha punished her for eating two chocolates by forcing her to stand in one place all day. During this time, Mahender laughed at her while she was standing in one place as an all day punishment. (Tr. 1791-92, 1847-49, 1855, 1869-70, 1877, 2082, 2367, 2445-47, 3494-95).

In addition, Hespeler, an electrician who worked in the home, testified that he observed Samirah wearing rags, in Mahender's presence. Also, the Sabhnanis' gardener, Pascarella, testified that he and Mahender watched as Samirah and Enung

struggled to carry a large heavy bronze statue from inside the house to an area near the pool. Pascarella offered to carry the statue for them, but Mahender refused and stated that Samirah and Enung could handle the task. (Tr. 3586, 3587, 3650-53).

In addition, and significantly with regard to the Mahender convictions, the trial testimony revealed that Mahender owns a perfume company and his offices were formerly in the house and are now actually located adjacent to the home. As a result, he was at home most of the day. Mahender was home with Samirah on a daily basis for five years. He was home with Enung on a daily basis for two years. A reasonable jury could believe that he had to see, hear and know about the many abuses by his wife Varsha, and could have prevented much of the abuse. Further, based on this evidence, a reasonable jury could have found that Mahender participated in some of these cruel acts, and that he wanted them to happen. In fact, Mahender's own employee, Litras, testified regarding her contact with Samirah and Enung during her work day. She observed them dressed in tattered rags on multiple occasions. She bought them food and treats because she felt sorry for them. In addition, she testified that while Mahender sat in his office one day, she saw Samirah crouching outside the office bleeding from her head, and later, saw a smudge of blood on the basement door. Litras testified that she waved Samirah away so Mahender would not see her. (Tr. 1791-92, 2082, 3195-99, 3834, 3842-48, 3853-57, 3878-79, 3881-93, 3947, 3966, 3968-69).

C. The Verdict

On December 17, 2007, the jury returned a verdict finding both Defendants guilty of all 12 counts in the indictment.

On January 2, 2008, the Defendants moved for a new trial pursuant to Fed. R. Crim. P. 33. The Defendants contended that, during the trial, one of the jurors prematurely stated in the parking lot, "guilty, guilty," and as a result, the Defendants' rights to a fair trial were violated. Following a hearing, the Court denied the Defendants' motions in a written decision, United States v. Sabhnani, No. 07-cr-429, 2008 U.S. Dist. LEXIS 6167 (E.D.N.Y. Jan. 14, 2008).

D. The Present Motions

On January 21, 2008, Mahender moved for a judgment of acquittal. Mahender contends that the evidence at trial is insufficient to prove that he participated in forced labor, peonage or document servitude. Mahender contends that there is no evidence that he was aware of Varsha's conduct or sanctioned her conduct. He argues that he was not present during the abuse; did not spend time in close proximity to Samirah or Enung; and did not have a legal duty to stop Varsha. In addition, he contends that he did not undertake purposeful conduct in furtherance of the crimes and that his knowledge is not sufficient to justify his conviction because he did not endorse the abuse.

On January 23, 2008, Varsha moved for a judgment of acquittal arguing that the trial evidence is insufficient to justify her conviction. Specifically, Varsha contends that the testimony provided by Samirah and Enung is contradictory and that they are biased and their motives to lie were established

during the trial. She further contends that the evidence adduced by the Government, including the victims' medical records, and the testimony from Litras and Pascarella, failed to substantiate the claims.

On January 23, 2008, Varsha also moved for a new trial, pursuant to Fed. R. Crim. P. 33, again arguing that the allegations made by Samirah and Enung are not supported by other evidence adduced at the trial. She contends that Samirah is mentally unstable, as exemplified by her belief in black magic. Finally, she claims that, as a result of the media attention and publicity during the trial, this Court should grant a new trial for her. The Government opposes all the motions. The Government contends that the evidence adduced at trial is sufficient to sustain the Defendants' convictions and that no exceptional circumstances exist to justify granting a new trial.

II. DISCUSSION

A. Standards Of Review

1. The Rule 29 Standard of Review

The standard of review on a motion for a judgment of acquittal is well-settled. In the Second Circuit it has been repeatedly stated that a defendant challenging a conviction on the basis of insufficient evidence bears a heavy burden. United States v. Thomas, 377 F.3d 232, 237 (2d Cir. 2004); United States v. Tocco, 135 F.3d 116, 123 (2d Cir. 1998); United States v. Russo, 74 F.3d 1383, 1395 (2d Cir. 1996). This is because the evidence must be viewed in the light most favorable to the government and all permissible inferences must be drawn in its favor. See United States v. Irving, 452 F.3d 110, 117 (2d Cir. 2006); United States v. Jones, 393 F.3d 107, 111

(2d Cir. 2004); United States v. Hernandez, 85 F.3d 1023, 1030 (2d Cir. 1996); see also United States v. Casamento, 887 F.2d 1141, 1156 (2d Cir. 1989). The court also must defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences. Tocco, 135 F.3d at 123; see also United States v. Pelaes, 790 F.2d 254, 259 (2d Cir. 1986).

A conviction must be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997). Further, the elements of the crimes charged may be established entirely by circumstantial evidence. See United States v. Sureff, 15 F.3d 225, 228 (2d Cir. 1994). Also, the court must consider the evidence in its totality, and not in isolation. United States v. Rosenthal, 9 F.3d 1016, 1024 (2d Cir. 1993).

"If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000). With these principles in mind, the Court must uphold the jury's verdict if it finds that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560.

2. The Rule 33 Standard of Review

Rule 33 is very brief and states that upon the defendant's motion "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. This rule by its

terms gives the trial court "broad discretion to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992); see also United States v. Robinson, 430 F.3d 537, 543 (2d Cir. 2005). In deciding such a motion, the court may weigh the evidence and the credibility of witnesses, but cannot "wholly usurp" the role of the jury. United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000); United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999).

This standard has also been described as a "heavy burden," United States v. Fearon-Hales, No 04-231, 2005 U.S. Dist. LEXIS 21619, *3 (S.D.N.Y. Sept. 26, 2005), and "[i]t is well-settled that motions for new trials are not favored and should be granted only with great caution." United States v. Costello, 255 F.2d 876, 879 (2d Cir. 1958). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001).

B. As To Varsha's Rule 29 Motion

1. As to the Sufficiency of the Evidence

Varsha contends that the evidence is insufficient to sustain her conviction because the jury relied solely upon the testimony of Samirah and Enung. As previously discussed, Samirah and Enung testified at length regarding the conditions of their employment and their abuse. Although Varsha attempts to point out inconsistencies in the witness' testimony, such as Enung's statement that she may, at some point, have cut Samirah, this Court must defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences. Tocco, 135 F.3d at 123; Pelaes, 790 F.2d

at 259. Moreover, despite Enung's comment, the Court must consider the evidence in its totality, and not in isolation. Rosenthal, 9 F.3d at 1024. Enung's random comment regarding cutting Samirah does not justify a judgment of acquittal.

Similarly, although defense witnesses testified that they never saw Samirah wearing rags, Samirah, Enung, Litras and Hespeler testified that Samirah did in fact wear rags at various times. Although Enung testified that Samirah retrieved rags from the trash to wear after Varsha threw them away, that comment in isolation again does not justify overturning the jury's verdict.

Further, Varsha contends that both Samirah and Enung had motives to lie. She claims that Samirah fabricated her testimony to avenge her son's death because she believed that Varsha killed her son. She further claims that Enung fabricated her testimony as a part of a scheme to get rich. However, these theories on the part of Varsha are entirely speculative and do not justify a judgment of acquittal. These are, once again, issues of witness credibility that were appropriately assessed by the jury. The jury heard all of the testimony, including any potential bias or motives that the defense brought out on cross examination of the witnesses. As previously stated, this Court must defer to the jury's resolution of witness credibility. Tocco, 135 F.3d at 123; Pelaes, 790 F.2d at 259. Moreover, at trial, Varsha presented her theory of the witness' potential bias and motives to lie, a theory that was apparently rejected by the jury.

According to the Second Circuit, "[m]atters of the choice between competing inferences, the credibility of the witnesses, and the weight of the evidence are

within the province of the jury, and we are not entitled to second-guess the jury's assessments." United States v. Rea, 958 F.2d 1206, 1221-22 (2d Cir. 1992). In the present case, the jury assessed the credibility of Samirah and Enung and evaluated the totality of the testimony. Its verdict is based on substantial evidence, as partially set forth above.

2. As to Corroboration of the Victims' Testimony

Varsha also contends that the Government failed to introduce evidence to corroborate the testimony of Samirah and Enung. Initially, the Court notes that such corroborating evidence is not required. The testimony of Samirah and Enung stands on its own, and such direct eyewitness evidence is sufficient to convict. Notwithstanding such compelling direct evidence, Varsha contends that Samirah's medical records, as well as the testimony of Litras and Pascarella, do not support the allegations of abuse. However, as discussed above, the jury weighed the evidence and the credibility of witnesses. With reasonable certainty, the jury credited the testimony of Samirah and Enung and the fact that other evidence did not corroborate their testimony does not necessarily justify granting a motion for a judgment of acquittal. As previously stated, the elements of the crimes charged may be proved entirely by circumstantial evidence. See Sureff, 15 F.3d at 228. However, in this case, there was direct eyewitness evidence by various witnesses including the victims and Litras. In addition, various law enforcement officers who searched the house testified regarding the findings they made, including Enung's passport and visa locked in the Defendants' closet. The Court finds

that the trial testimony is clearly sufficient to justify Varsha's conviction.

Varsha correctly contends that, according to Samirah's blood test results, there is no evidence that she was malnourished, and, further, that her bone scan showed no evidence of facial fracture, despite claims that she was hit in the face. However, "the government's failure to corroborate a witness's testimony raises a question as to the weight a jury might choose to give that testimony, not its legal sufficiency to support a conviction." United States v. Florez, 447 F.3d 145, 155 (2d Cir. 2006). Moreover, "a federal conviction may be supported 'by the uncorroborated testimony' of even a single accomplice witness 'if that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt.'" Id. (citing United States v. Parker, 903 F.2d 91, 97 (2d Cir. 1990)). Although the medical evidence does not depict malnourishment or bone fractures, the jury reasonably believed the victims' testimony. The clear uncontradicted evidence in this trial, including photographs of the injuries to Samirah, clearly permitted the jury to conclude that Samirah was beaten and cut by Varsha, and that Samirah and Enung were not provided with sufficient amounts of food.

Moreover, although Varsha correctly notes that neither Litras nor Pascarella saw Varsha abuse Samirah or Enung, the testimony from both witnesses provided corroboration for the victims' testimony. As previously noted, Litras testified that she provided them with food and treats; consciously hid her assistance to them from Mahender; and saw blood dripping from Samirah's head and smeared on a door. Pascarella additionally testified that he also

provided the women with food. "Given the jury's prerogative to determine the credibility of the witnesses, who they evidently found believable, a reasonable view of the evidence would permit the jury to conclude that the Government met its burden of proof." United States v. Bueno, No. 98-cr-534, 2000 U.S. Dist. LEXIS 2433, at *8 (N.D.N.Y. Mar. 3, 2000).

As such, Varsha's Rule 29 motion is denied.

C. As To Varsha's Rule 33 Motion

1. As to Samirah's Credibility and Corroboration of her Claims

In support of her Rule 33 motion for a new trial, Varsha repeats many of the same arguments set forth in support of her Rule 29 motion and previously addressed by this Court. She again claims that Samirah's allegations of abuse are not supported by the medical evidence introduced at the trial. As this Court discussed these claims in detail in the previous section, the Court will not repeat its findings. However, as the standard on Rule 33 is different from that applicable to Rule 29 motions, the Court finds that although it may weigh the evidence and the credibility of witnesses in its present assessment, it cannot "wholly usurp" the role of the jury. Autuori, 212 F.3d at 120. Once again, this standard has been described as a "heavy burden," Fearon-Hales, 2005 U.S. Dist. LEXIS at *3, and "[i]t is well-settled that motions for new trials are not favored and should be granted only with great caution." Costello, 255 F.2d at 879.

In the present case, allowing the jury's verdict to stand with regard to Varsha would not be a manifest injustice. Although Varsha correctly notes that there

is no medical evidence of Samirah's malnourishment and that various physical examinations performed at the hospital were normal, without usurping the jury's role, the Court finds that Samirah's testimony was credible. Samirah's testimony regarding lack of food was corroborated by the testimony of both Litras and Pascarella who testified that they provided food to Samirah and Enung because they felt sorry for them. Both Litras and Pascarella believed that the women were hungry and lacked a sufficient amount of food.

Similarly, the Court finds that despite the fact that many of Samirah's medical examinations were normal, Samirah's testimony regarding her beatings and cutting was credible and corroborated. Both Samirah and Enung testified to Varsha's physical abuse. Both victims testified over the course of many days and both testified to the same actions by Varsha with regard to her mistreatment of Samirah. Further and significantly, Mahender's employee Litras testified that she saw Samirah's head bleeding and blood on the door. Also, the jury saw photographs of Samirah, taken at the hospital, depicting bruises, cuts and scrapes on her face and cuts behind her ears. In this regard, the Court notes that Samirah testified for approximately one week, and the Defendants' counsel cross-examined her at length. After hearing the totality of her testimony, as well as the corroborating testimony, and viewing the photographs, the jury clearly credited her testimony, and, on this record, they had a right to do so. Weighing the evidence and the credibility of the witnesses, the Court finds that there is no extraordinary circumstance in this case that would justify a new trial.

The Defendant further contends that Samirah's mental instability and inability to distinguish between truth and fiction are demonstrated by her belief in witchcraft and black magic. The Court disagrees. As the Defendant asserts, during her trial testimony, Samirah made statements referring to her belief in some sort of magic, including her belief that Varsha cast a spell on her son. However, the jury heard all of Samirah's testimony, including her belief in magic, and still obviously determined that her testimony was credible.

A reasonable jury could accept Samirah's testimony, even considering her beliefs. Samirah's admitted belief in magic does not necessitate a finding that she has had a "break with reality," as claimed by the Defendant. Many people of different cultures around the world believe in various forms of what can be referred to as magic, spells or curses. Samirah's belief in the casting of spells does not necessitate a finding that she lacked credibility or that her testimony should have been disregarded by the jury.

2. As to the Publicity

Finally, Varsha contends that this Court should grant her motion for a new trial because of the nature, extent, and pervasiveness of negative publicity during the trial. In particular, Varsha contends that she was prejudiced by the volume of media coverage, which she contends is uncommon, as well as by the sensational headlines.

"The Second Circuit made clear in United States v. Gigante that 'the trial court has broad discretion in determining whether prejudice has resulted from publicity during trial.'" Johnson v. United States, 307 F. Supp. 2d 380, 388 (D. Conn. 2003) (citing 729

F.2d 78, 82 (2d Cir. 1984)). "The Court emphasized that each case must turn on its own facts, and the essential question is whether the jurors returned the verdict with the requisite impartiality." Id. "Whether publicity is so prejudicial as to require a new trial is ordinarily committed to the trial judge's discretion. 'Generalizations beyond that statement are not profitable, because each case must turn on its special facts.'" United States v. Brasco, 385 F. Supp. 966, 972 (S.D.N.Y. 1974) (citing United States v. Armone, 363 F.2d 385, 396 (2d Cir.1966)). Moreover, even in cases where a juror read a newspaper article regarding the trial, "that alone is not ground for a new trial. . . . The burden was upon counsel for defendant to show that prejudice resulted." Id.

In the present case, Varsha does not contend that any juror improperly viewed any media coverage of the trial. Instead, she merely claims that there was such an abundance of negative coverage, that the jurors would likely have been exposed to news stories. The Court finds that contention to lack merit. On each trial day, the Court instructed the jury to avoid media coverage about the trial and the case and to avoid discussing the case. On a daily basis, the Court instructed the jurors not to read a popular Long Island newspaper or watch the Long Island news channel. There is no evidence that the jurors failed to follow these daily instructions given to them for seven weeks. Varsha does not claim that any juror disregarded the Court's instructions.

In fact, when the Defendants informed the Court that an article had appeared in the New York Times regarding human trafficking during the trial, the Court immediately inquired as to whether any juror had read the article. In addition, when the defense

informed the Court during the trial of an article in Newsday regarding human trafficking, which referred to the case, the Court again immediately inquired as to whether any juror had seen the article. None of the jurors had read either article. Although the case was highly publicized on Long Island and depicted in various articles, there is no evidence that Varsha was prejudiced because there is no evidence that the jury was actually exposed to any such publicity.

Moreover, as discussed in detail above, there was sufficient evidence at the trial to justify Varsha's conviction on all counts. There is no evidence that the jury's decision was based on any inappropriate or improper factors or considerations. In addition, the Court observed and stated repeatedly that the jury was alert throughout the trial and behaved in an exemplary manner.

Accordingly, Varsha's Rule 33 motion is denied.

D. As To Mahender's Rule 29 Motion

Mahender contends that he was not aware of Varsha's conduct and more importantly, that he did not act with the requisite specific intent to commit forced labor, peonage or document servitude.

1. As to Aiding and Abetting and Conspiracy to Commit Forced Labor, Peonage and Document Servitude

As Mahender correctly notes, aiding and abetting and conspiracy are specific intent crimes. In order to prove conspiracy

> the government must show that the defendant agreed with another to commit the offense; that he knowingly engaged in the con-

> spiracy with the specific intent to commit the offenses that were the objects of the conspiracy; and that an overt act in furtherance of the conspiracy was committed . . . A conspiracy need not be shown by proof of an explicit agreement but can be established by showing that the parties have a tacit understanding to carry out the prohibited conduct.

United States v. Samaria, 239 F.3d 228, 234 (2d Cir. 2001) (internal citations omitted). "[T]he government [must] establish beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute." Id. However,

> [t]he government may prove knowledge and specific intent either by direct evidence, or . . . with circumstantial evidence. This Court has repeatedly emphasized, however, that a defendant's mere presence at the scene of a criminal act or association with conspirators does not constitute intentional participation in the conspiracy, even if the defendant has knowledge of the conspiracy.

Samaria, 239 F.3d at 235.

"[A]iding and abetting is also a specific intent crime. To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted . . . with the specific purpose of bringing about the underlying crime." Samaria, 239 F.3d at 234-35 (internal citations omitted). "Much like a conspiracy charge, in order to prove that a defendant aided and abetted a substantive crime, the government must prove that the defendant 'joined and shared in the underlying criminal endeavor and that his efforts

contributed to its success'". United States v. Smith, 198 F.3d 377, 383 (2d Cir. 1999)

Further, forced labor, peonage and document servitude are also specific intent crimes. As the jury was instructed at the trial, a conviction of forced labor under 18 U.S.C. 1589 required the government to prove beyond a reasonable doubt that (1) the defendant obtained the labor or services of another person; (2) the defendant did so through one of the following prohibited means (a) through threats of serious harm to, or physical restraint against that person or any other person; or (b) through a scheme, plan or pattern intended to cause the person to believe that nonperformance would result in serious harm to, or physical restraint against, that person or any other person; or (c) through the abuse or threatened abuse of the law or the legal process; and (3) that the defendant acted knowingly. (Tr. 5024-25). See also United States v. Marcus, 487 F. Supp. 2d 289, 310 (E.D.N.Y. 2007).

As the jury was instructed at the trial, a conviction for peonage required the Government to prove beyond a reasonable doubt (1) that the Defendant held Samirah and Enung in a condition of involuntary servitude;(2) that the Defendant held Samirah and Enung by using force, physical violence, intimidation or other compulsion; (3) that such holding was for a "term"; (4) that the Defendant acted knowingly and willfully with specific intent to violate the law; and (5) that the Defendant kept the person to satisfy a real or imagined debt, regardless of amount. (Tr. 5094).

As the jury was instructed at the trial, a conviction for document servitude required the Government to prove, beyond a reasonable doubt that the

Defendant (1) did conceal, remove, confiscate, or possess an actual passport, visa, or other immigration documents of Samirah and Enung; (2) that the Defendant did these acts in the course of a violation of 18 U.S.C Section 1581, the peonage statute, or 1589 the forced labor statute, with the intent to violate those statutes; and (3) that the Defendant acted knowingly and intentionally. (Tr. 5115).

2. As to the Evidence of Mahender's Knowledge and Specific Intent

The jury determined that Mahender was guilty of the substantive crimes of forced labor, peonage and document servitude, as well as conspiracy to commit those crimes. The Court must uphold the jury's verdict if it finds that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560.

Mahender contends that his conviction should be set aside because: (1) the evidence was insufficient to prove that he had knowledge of his wife's abuse of Samirah and Enung; (2) the evidence was insufficient to show that he acted wilfully and with the specific intent to commit forced labor and peonage; and (3) the evidence was insufficient to support his conviction under a failure to act rationale. Again, the Court disagrees. The Court finds that the trial evidence was sufficient to demonstrate that Mahender conspired with and aided and abetted Varsha to commit forced labor, peonage and document servitude. In this regard, the Court finds that the Government established that Mahender had the specific intent to violate the substantive statutes. The trial evidence established that Mahender's efforts con-

tributed to the success of the criminal endeavors. Smith, 198 F.3d at 383.

Although Mahender, in a well drawn brief, cites numerous cases in which Courts have held that the evidence was insufficient to sustain convictions for conspiracy and aiding and abetting, in those cases the defendants did not participate or associate themselves with the criminal venture. For example, in many of the cases cited by Mahender, the defendant was merely present in a house, for a short period of time, while a crime was being committed and had knowledge of the crime. In one of the cases cited by Mahender, the defendant was present in a car carrying drugs, and in another case, the defendant was living in an apartment for one month that was actually serving as a narcotics cutting mill. Although the courts found that joint occupancy, knowledge and even obtaining a benefit from the crimes, without participation, were not sufficient to establish the requisite specific intent, Mahender's presence in the house with Samirah for five years and his participation results in a much different scenario.

In this case, the trial evidence demonstrates that Mahender was not just an occupant of the Sabhnani house who did not understand and participate in his wife's conduct. Rather, it is evident that Mahender acted purposefully to associate himself with the crimes and with the specific intent to commit or aid and abet in the crimes charged.

First, regarding the specific intent to commit forced labor, the trial evidence previously discussed demonstrates that Mahender had the intent to obtain the services of Samirah and Enung through Varsha's conduct which threatened both Samirah and Enung. Mahender reported to Varsha that

Samirah was sleeping, and as a result, Varsha beat her. Mahender permitted Samirah and Enung to carry a heavy statue and refused any offer to assist them. Mahender allowed Samirah to follow him around with a tray of beverages, despite her "raggedy" clothing and swollen face. In fact, as to the "rags," Samirah testified, as follows:

Q. During the five years that you worked there, did the mister see you wearing the rags?

Mr. Scaring: Objection, your Honor. Leading questions.

The Court: Overruled.

A. Yes, every day.

Q. How many times a day did you see the mister when you worked at the house between 2005 and 2007?

A. Every day because the mister would go to the front room, every day.

Q. Could the mister see your face?

Mr. Scaring: Objection.

The Court: Pardon?

Mr. Scaring: Objection. She cannot testify as to what the mister saw, your Honor.

The Court: Overruled. She can have an opinion as a layperson.

A. Yes. Every day, he would see because he will see.

Q. Would see what?

A. To see my face, to see the clothings, also, all the marks from the beatings from missus. I would cry and the mister would look at me.

> He would look at me this way, and then mister wouldn't say anything or do anything.

(Tr. at 2367-68). Mahender even laughed at Enung as she stood in one place all day, fulfilling her punishment for eating two chocolates. Moreover, as Litras testified, Samirah was bleeding from her head outside Mahender's office in the residence.

Although there is no evidence that Mahender physically abused Samirah and Enung, the trial evidence is sufficient to show that he had, not only knowledge of Varsha's actions, but the specific intent to violate the forced labor statute. Mahender's actions demonstrate that he "joined and shared in the underlying criminal endeavor and that his efforts contributed to its success." Smith, 198 F.3d at 383. As to Samirah, for five years he permitted these acts to occur and joined in some of them. He participated in the same conduct with Enung for two years.

Second, with regard to the specific intent to commit peonage, Mahender was aware that Samirah and Enung were being held at the Sabhnani house to work against their will. He also had the specific intent to hold them for many years in a condition of involuntary servitude by way of Varsha's threats and coercion. Mahender himself took Samirah and Enung to clean another person's house without paying them. He reported them to Varsha so that she could administer their punishment when they failed to perform their expected duties, and even laughed as he witnessed Enung's punishment. They slept on the floor in his house for years and he watched as they worked with only four hours of sleep each night. Once again, although he did not personally physically abuse them or personally verbally threaten them, the trial evidence shows his specific intent to

hold them in a condition of involuntary servitude by means of Varsha's threats and actions. This does not evidence mere knowledge by Mahender or his mere joint occupancy of the house; rather, it evidences his knowing participation in the criminal endeavors.

Similarly, the evidence also demonstrates his specific intent to commit document servitude. The victims' relevant documents were found in a locked cabinet in the closet he shared with Varsha. Mahender met the women at the airport and knew that they had arrived from Indonesia. On the evidence adduced at the trial, the jury could reasonably conclude that he participated in the concealment of the women's immigration documents. In addition, as previously discussed, there was evidence over this long period of time that he had the specific intent to commit forced labor and peonage.

Mahender further contends that the Court erred in instructing the jury that aiding and abetting can be accomplished by action or by a defendant's failure to act. Mahender claims that there is no evidence that he had a duty to act and failed to do so. He contends that Samirah and Enung never complained to him or asked him for medical assistance, and, as a result, no duty arose.

"In order to prove a defendant guilty of aiding and abetting, 'the government must . . . prove . . . that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime.'" Smith, 198 F.3d at 388 (citing United States v. Pipola, 83 F.3d 556, 562 (2d Cir. 1996)). See also United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990) ("To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed

by a person other than the defendant and that the defendant acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime").

In any event, despite Mahender's claim that he could not be guilty as an aider and abettor for failing to act because he had no duty to act, the Court finds that there was sufficient evidence at the trial to prove that Mahender affirmatively acted with the specific intent to advance the crimes alleged in the indictment. The Government proved that Mahender acted "with the specific purpose of bringing about the underlying crime[s]." Samaria, 239 F.3d at 234-235. The proof was clear that Mahender had the knowledge and specific intent. As stated above, although Mahender did not physically beat Samirah and Enung, his actions go well beyond mere knowledge and joint occupancy of the house. As discussed, for years Mahender permitted and, to some extent, participated in these deplorable conditions as to Samirah and Enung. His actions with regard to Samirah and Enung aided the underlying criminal endeavors. As a result, this is not only a failure to act case; rather, this is a case where the Defendant took affirmative action in support of the crimes charged in the indictment. Accordingly, Mahender's Rule 29 motion is denied.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the Defendant Varsha Sabhnani's Rule 29 motion for a judgment of acquittal is **DENIED**; and it is further

ORDERED, that the Defendant Varsha Sabhnani's Rule 33 motion for a new trial is **DENIED**; and it is further

ORDERED, that the Defendant Mahender Sabhnani's Rule 29 motion for a judgment of acquittal is **DENIED**.

SO ORDERED.

Dated: Central Islip, New York
March 11, 2008

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of May, two thousand and ten.

UNITED STATES OF AMERICA,

Appellee, Docket No. 08-3720-cr (L)

08-3731-cr (Con)

-v.-

MAHENDER MURLIDHAR SABHNANI, VARSHA MAHENDER SABHNANI,

Defendants-Appellants.

Mahender Sabhnani and Varsha Sabhnani having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,		
	:	07-CR-429 (ADS)
-against-	:	United States Courthouse
VARSHA MAHENDER SABHNANI and MAHENDER MURLIDHAR SABHNANI,		Central Islip, New York
	:	December 5, 2007
Defendants.		9:30 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE AUTHOR D. SPATT
UNITED STATES DISTRICT COURT JUDGE, and a jury

* * * * * * * * * * *

Proceedings recorded by computerized stenography.
Transcript produced by CAT.

* * *

[Page 4426]

* * *

MS. WOLFE: And, your Honor, Mr. Scaring mentioned -- and I didn't hear it, but I'm going to rely on it -- that your Honor charge that in the definition of willfully, language to the effect that in the case of a failure to act --

THE COURT: Yes.

MR. SCARING: I don't believe that is an appropriate charge, your Honor, with regard to aiding and abetting, and I think it is confusing, your Honor.

THE COURT: No, I'm going to leave it in. You have an exception. I don't think it is confusing at all.

What if you are supposed to do something, if it is a proper thing, and you don't do it? It's a violation of the law.

MR. SCARING: But your Honor has charged that mere presence, even with the knowledge that a crime is **[Page 4427]** being committed --

THE COURT: That's true.

MR. SCARING: -- is not aiding and abetting. So, therefore, that person doesn't have an affirmative responsibility to do anything.

THE COURT: Have you got the charge book there?

MR. SCARING: I do. We have it here, your Honor. I haven't found it in here -- I'm sorry, it is.

MS. WOLFE: Your Honor, I believe that language is appropriate for offenses, for example, tax cases, where the law imposes an affirmative duty on the defendants to do something and there's a failure to act, which is the crime. We don't have that here.

MR. SCARING: That is how it is described, your Honor, if I can pass it up.

THE COURT: No, in the case of a failure to act with the specific intent to fail to do something the law requires to be done, that's not mere presence.

MS. WOLFE: But we don't have an offense here which charges a crime of failure to do something --

THE COURT: Sure we do. We have a load of them to stop what is going on in there, if you take what the government says is true. This man stayed there and let, for five years, these beatings, deprivation, lack of food, sleeping on the floor, wearing tattered gowns, hit with a **[Page 4428]** stick. He failed to do anything. No, I'm leaving it in.

MR. SCARING: Judge, it may so in a civil case where there may be civil liability, but in a criminal case, he doesn't have an affirmative responsibility to do anything.

If I'm on the street with Ms. Wolfe and she decides to beat up Mr. Lesko, even though it's aiding me, even though he will not be able to do as many motions, I don't have to stop her. I don't have to do anything. There's no affirmative responsibility unless they are in fact an aider and abettor.

THE COURT: But you are not the employer paying a salary to a house worker. So you do have a responsibility, criminally, in my opinion.

I will leave it in. You have an exception.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,		
	:	07-CR-429 (ADS)
-against-	:	United States Courthouse Central Islip, New York
VARSHA MAHENDER SABHNANI and MAHENDER MURLIDHAR SABHNANI,		
	:	December 10, 2007
Defendants.		8:45 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE AUTHOR D. SPATT
UNITED STATES DISTRICT COURT JUDGE, and a jury

* * * * * * * * * * *

Proceedings recorded by computerized stenography.
Transcript produced by CAT

* * *

[Page 4690]

[MR. LESKO:] Why Mahender? Why Mahender Sabhnani? Why should we convict him when the maid said he was nice?

Let's talk about this. Nice is a relative term. Judge Spatt is nice. We know that because he is a nice man, obvious to all.

Why did Samirah and Enung think Mahender Sabhnani was nice? Because he didn't beat them. That's why he is nice.

And why didn't he beat them? Because he didn't have to. He didn't have to beat them. His wife did all of the dirty work for him. And he was allowed to enjoy the fruits of their crimes -- the cheap labor, the unquestioning labor, day in and day out, of the servants in his huge house.

Ask yourselves this, ladies and gentlemen: Who is worse? The twisted soul who tortures the maid, or the man of the house that lets it happen?

Let's talk a little bit about why under the law Mahender Sabhnani is responsible for each and every action of his wife. He is charged in several counts as a conspirator. He entered into conspiracies with his wife and other family members.

He agreed to bring the maid from Indonesia to America. He agreed to pick them up at Kennedy Airport. He agreed to have them work in his home. He agreed to **[Page 4691]** harbor them.

And when the inevitable happened and when they made mistakes, or they wanted to leave, he knew what was going to happen. The enforcer would step in; his wife, who doled out the punishments and hid away the passports and threatened the death.

Varsha Sabhnani was the enforcer in the house so that Mahender Sabhnani could keep his hands clean.

Judge Spatt will instruct you on the law of conspiracy. It simply requires the existence of an agreement or an understanding between defendants to accomplish a criminal objective; in this case, forced labor, peonage and servitude. We have discussed those.

Those are the objectives. The coerced labor of Samirah and Enung. For those counts, the government must prove beyond a reasonable doubt, at least one overt act. And you must be unanimous as to that overt act.

Well, let's talk about the overt act as it relates to Mahender Sabhnani. That is an easy one.

He picked up the maid at Kennedy Airport. There is virtually no doubt about that. That is the overt act for all of those three counts for conspiracy counts.

Now, the harboring aliens count is just a little bit different. The objective was to --

THE COURT: You have to slow down a little bit.

[Page 4692]

MR. LESKO: I'm sorry.

The objective was the harboring of the aliens. But in this count, the government does not need to prove an overt act, even though I would suggest one was done by Mahender Sabhnani by picking up the maid at Kennedy Airport.

Now, the agreement between Varsha Sabhnani and Mahender Sabhnani, this is kind of silly because they're married. But the agreement can be inferred.

We don't have to show that they had a contract, a written agreement, or they sat around the table and they met minds. It can be inferred from all of the facts.

We must also establish that Mahender Sabhnani knowingly and willfully became a member of the conspiracies. But Judge Spatt will instruct you that a defendant need not be familiar or informed as to all of the details and the entire scope of the conspiracy to prove knowledge.

And the guilt of the defendant is not measured by the extent of his involvement. The law does not require an equal role. Even one act -- one act alone can make a defendant a conspirator. In essence, if you're part of the conspiracy and you're in for a penny, you're in for a pound.

And lastly, the overt act can be an innocent act **[Page 4693]** on its face, like picking somebody up at the airport. But that act shows guilt if it aids or helps a criminal scheme.

There is another concept in the law that Judge Spatt will explain to you. It is called aiding and abetting; aiding and abetting.

You don't have to have actually committed the crime to be an aider and abettor. All that needs to be established is that somebody else committed the crime, and that you knowingly and willfully associated yourself with that other person in some way to help with the crime. Help with the crime. And that can be done by action, or it can be done by a failure to act.

A failure to act with specific intent, to fail to do something the law requires.

There is an old proverb that explains aiding and abetting, I think pretty well, it goes something like this: He who holds the ladder is as guilty as the thief. He who holds the ladder is as guilty as the thief.

Now, what does that mean? He who helps even just a little bit, can be just as guilty as the person who commits the crime.

Let's talk about the evidence against Mahender Sabhnani. The overt acts I mentioned are simply picking up the maid at the airport.

[Page 4694]

Let's talk about his knowledge. I don't care if you live in Muttontown or Levittown or Jakarta or Timbuktu. You see this person shown in Government's 328 wearing these rags in your home, you know something is wrong.

If that was happening in your home, you would know something was wrong. And I guarantee you, you would do something about it if you saw that person in your home wearing these clothes.

It is happening in your house. And if you saw Samirah every day looking like that, serving your kids breakfast, cooking your food, cleaning your house, you would know something is wrong. She is a 50-year-old grandmother, and she is urinating in your house.

And don't tell me he didn't find out about that. You know something is wrong. She is in your house for five days, every single day. And you don't know something is wrong?

And who was punishing the maid and doing all of this torture? It wasn't a stranger. It was his wife.

His wife was doing it. And he received the proceeds of the crime. Cheap labor every day; food; clothing washed; housecleaning. She served water.

And he had to know about wages and benefits. He is a businessman, he has employees. He pays salaries and **[Page 4695]** retirement and benefits and health insurance.

And what were the maids paid? $100 a month; $150 a month.

And Samirah told you that Mahender Sabhnani saw her in the rags, saw her in the wet clothing, saw the hats. You see two maids with winter hats, and it is June? Something is wrong here.

Samirah told you that she saw -- he saw her pick up torn papers. He didn't do anything. He saw her sleeping in the basement bathroom. He didn't do anything.

He would take affirmative actions. He would call Debbie Litras, have her call and tell her, Oh, here is Varsha. Talk to her about food for the maid. He would tell her, Call Varsha in Indonesia. Call Varsha in Indonesia and talk to her about food for the maids.

He was used as a threat. You will be killed by the mister.

He reported to Samirah. He told on her to his wife. He told her she was sleeping. Remember he told the wife that Enung and Samirah were cooking rice when she shouldn't have been. And he told on Samirah for taking garbage out of the garbage can.

This defendant, Mahender Sabhnani, sees that maid taking food out of the garbage under his roof. And what does he do? He tells his wife. That's it.

Because **[Page 4696]** he knew what was going to happen.

He witnessed the punishment of Enung for the chocolates; he and his son, Rahul. She was forced to stand for hours. What did he do? He laughed.

He didn't take either Samirah or Enung to the doctor's, even when Samirah was urinating in the home. Even on the days when Debbie Litras -- and she told you about all of the serious health issues. She would have to take some time off from work. Even on the days where Debbie Litras was allowed to go to work, there was no doctors for the servants.

He didn't take Samirah to the doctor, even though he saw her face that looked like that. He saw the clothing. She explained to you that he saw the marks from the beatings. He would see her swollen hands, her missing teeth. He saw this and he did nothing.

By the way, who else told you about the marks on Samirah's face and the fact that they were visi ble? His friend. The computer guy, Jim Colletti. He saw that.

And perhaps most telling of all, when she left his house on Mother's Day for hours and hours, he didn't call the police. When that grandmother left that house in a country where she didn't know the language and didn't know where she was, he didn't call the police.

So what was Mahender Sabhnani's role in all of **[Page 4697]** this? Well, I think Varsha Sabhnani's term -- her word puts it best. He was the a gentleman, the king. A king who needed servants.

And he acted like a king, didn't he? It was kind of folded into the testimony. But do you remember the electrician Will Hespeler? It was a very small piece of testimony, but it was a window, a window into Mahender's Sabhnani's world.

Remember, he told you he was doing work in the house. And he meets this electrician. And he sees the maid with a tray filled with teas and fruits and water. And what is the maid doing? She is following Mahender around in the house like a king.

Remember when Anthony Pascarella, the gardener, he explained to you the scene with the statues. Remember that, the bronze statues? The king and the queen, he built that pier in the pool. The bronze statue of -- the heavy bronze statue was going to be placed on the pier.

And he described how Samirah and Enung were struggling to carry that statue out to the pier -- weighed about 150 pounds. And Anthony wanted to help the maids because they were struggling with the statue, and he asked Mahender Sabhnani if he could help them.

What happened, did he say? No. They can handle it. They can handle it. They -- Samirah and Enung -- **[Page 4698]** they can handle that statue. A statue -- together they probably weighed as much as the statue, but they can handle it, not the gardener and his worker.

He was the king of this house, ladies and gentlemen. And his queen was his enforcer who did the dirty work for him, and let him enjoy the benefits of the labor of Samirah and Enung day after day.

And under the law of conspiracy, and under the law of aiding and abetting, he is just as responsible

as she is for all of her actions -- just as responsible. The punishments and threats, the passports, the debts owed, all of that. The threats of the police.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,		
	:	07-CR-429 (ADS)
-against-	:	United States Courthouse
VARSHA MAHENDER SABHNANI and MAHENDER MURLIDHAR SABHNANI,		Central Islip, New York
	:	December 12, 2007
Defendants.		11:30 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE AUTHOR D. SPATT
UNITED STATES DISTRICT COURT JUDGE, and a jury

* * * * * * * * * * *

Proceedings recorded by computerized stenography.
Transcript produced by CAT

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[Page 5034]

* * *

[THE COURT:] I'm now going to talk to you about the concept of aiding and abetting.

With regard to Counts Two and Three, the forced labor counts, the government has also charged the defendants with aiding and abetting the commission of those crimes. The aiding and abetting statute, Title 18 of United States Code Section 2, provides that:

Whoever commits an offense against the United States or aids and abets or counsels, commands or induces, or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

Under the aiding and abetting statute, it is not necessary for the government to prove that the defendant herself or himself physically committed the crime with which she and he is charged in order for you to find the defendant guilty.

A person who aids and abets another to commit an offense is just as guilty of that offense as if she or he committed it himself or herself.

Accordingly, you may find a defendant guilty of **[Page 5035]** the offenses charged in Counts Two and Three, if you find, beyond a reasonable doubt, that the government has proved that another person actually committed the offense with which the defendant is charged and that the defendant aided or abetted that person in the commission of the offense.

As you can seen, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first

place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate herself or himself in some way with the crime and that she or he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally or in the case of a failure to act with the specific intent to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or to disregard the law.

[Page 5036]

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. And aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which she or he is charged, ask yourself these questions:

Did the defendant participate in the crime charged as something she or he wished to bring about?

Did the defendant associate herself or himself with the criminal venture knowingly and willfully?

Did the defendant seek by her or his actions to make the criminal venture succeed?

If the government proves beyond a reasonable doubt that the defendant did these things, then the **[Page 5037]** defendant is an aider and abettor and therefore guilty of the offense.

If on the other hand your answers to any one of these series of questions -- your answer to any one of these series of questions is no, then the defendant is not an aider and abettor and you must find him or her not guilty as to aiding and abetting.

In sum, if you find that the defendant you are considering committed the crimes charged in Counts Two and Three or aided, counselled, commanded, induced or procured the commission of those crimes, then you should find the defendant guilty of the crimes charged in those two counts.

On the other hand, if the government has not satisfied you beyond a reasonable doubt that the defendant you are considering either knowingly and willfully committed the crimes charged in Counts Two and Three or aided and abetted in the commission of those crimes, then you must find her or him not guilty of the crimes charged in those two counts.

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	07-CR-429 (ADS)
-against-	:	United States Courthouse Central Islip, New York
MAHENDER MURLIDHAR SABHNANI,	:	June 27, 2008
Defendant.	:	1:30 p.m.

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE AUTHOR D. SPATT
UNITED STATES DISTRICT COURT JUDGE

* * * * * * * * * * *

Proceedings recorded by computerized stenography.
Transcript produced by CAT

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[Page 37]

* * *

THE COURT: The reasons for the Court's imposition of sentence are as follows:

I accept the facts as revised in the presentence report.

The role of Mahender is not as clear, certainly as Varsha Sabhnani, who was the perpetrator, who was the participant, the active participant in these cruel acts toward the two maids.

Samirah was met at the airport by Varsha and Mahender, who took possession of Samirah's passport. Mahender certainly knew that Samirah and Enung were both continuing to stay in the United States illegally after the time when their visas expired, and he did nothing.

Mahender was in this house 7 days a week, 24 hours a day. His office originally was right in the house, and then was annexed to the house. So he was there all the time. He had to see, had to see some of what was going on by Varsha with these two maids, the abuse heaped on the two maids. And so the jury found that he aided and abetted in these crimes, though he was not a participant at all.

I stated in my opinion denying a Rule 29 and Rule 33 motions, what he did, according to the transcript.

[Page 38]

It's true that both Samirah and Enung testified that he was nice, or good. However, as I stated in the opinion, that was not always precisely accurate. Samirah also testified that, "The Mister is nice, not as mean as the Missus."

In addition, Samirah testified that when Varsha beat her, no one else was present. And Enung testified that when Samirah was beaten, Mahender was not home.

Further, they testified that Mahender was not present when many of these cruel things occurred. In addition, they were, the two women, were unable to communicate with Mahender, because he did not speak Indonesian.

And Mahender noted in his post-verdict submission, that when the defense witnesses testified they did not observe injuries to Samirah when they were present in the Sabhnani home. Other people who would come in. However, Samirah did testify that although Mahender was not present during the beatings, afterwards Mahender did see her face swollen.

The trial testimony revealed that Mahender observed Samirah eating food from the trash. And on another occasion, sleeping in the bathroom. According to Samirah, Mahender reported both events to Varsha. She didn't hear this, but this is what she surmised. That **[Page 39]** after these events, Mahender reported both events to Varsha, who then, "Immediately hit her."

In addition, Samirah testified that Mahender scolded her and took her, "To clean another person's home." Which is what happened.

Mahender also saw Samirah wearing rags. Notably, Enung testified that Varsha punished her for eating two chocolates, by forcing her to stand in one place all day. During this time, she testified, Mahender laughed at her while she was standing in one place as an all-day punishment.

In addition, an electrician who worked in the home testified that he observed Samirah wearing rags in Mahender's presence.

Also, the Sabhnanis' gardener testified that he and Mahender watched as Samirah and Enung

struggled to carry a large, heavy bronze statue from inside the house to an area near the pool. The gardener offered to carry the statue for them, but Mahender refused, and stated that Samirah and Enung could handle the task.

Significantly, with regard to the Mahender convictions, he owns this perfume company. His offices were formerly in the house, and then adjacent to the house. As a result, he was at home most of the day. He was home with Samirah on a daily basis for five years. He **[Page 40]** was home with Enung on a daily basis for two years.

As I stated in my opinion, a reasonable jury could believe that he had to see, hear, and know about the many abuses by his wife. And could have prevented much of the abuse.

The testimony by his own employee, Deborah Litras, was already related to you. When she saw a bloody Samirah come in and she quickly waved her away so Mahender could not see. Why was that?

* * *

[Page 42]

* * *

Factors to be considered in imposing a sentence:

The Court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph 2 of this subsection. The Court in determining the particular sentence to be imposed, shall consider: 1, the nature and circumstances of the offense.

Well, in fact this defendant had only a minimal role, a minimal role in these offenses. He just didn't do anything. He was passive. He didn't do any of the acts of abuse. He never hit anybody, he never cut anybody, he never deprived them of food. He just didn't do anything. So he had a minimal role, minimal.

[Page 43]

1, the nature and circumstances of the offense. Which I just described in detail.

And the history and characteristics of the defendant.

Well, the history and characteristics of the defendant are good. He came here as an immigrant from India. He was a naturalized citizen. He didn't come illegally. He worked hard, built up a business -- two businesses, I understand -- moved from Queens to Hicksville to Syosset, bought a beautiful house, expensive house over a million dollars, bought a condominium apartment in Manhattan for another more than a million dollars, supported his four children.

So the history and characteristics of the defendant are good, very good. He is a success story. The American view, dream. The immigrant who came to this country and succeeded in business.

But he permitted all of this to go on, had to know about it, had to know about it, these dreadful things, had to know that were going on. And did nothing. So the history and characteristics are good, very good.

Next; the need for the sentence imposed to reflect the seriousness of the offense. Very serious, as Mr.

Lesko dramatically stated; slaves in the United States, abused slaves.

[Page 44]

To reflect the seriousness nest of the offense.

To promote respect for the law. Very important.

And, as I stated yesterday, a very important component; to provide just punishment for the offense. We do things that are bad, we must get punished for them.

And the next purpose, also very important; to afford adequate deterrence to criminal conduct, to send the word out, if you do things like this, you're going to be seriously punished.

To protect the public from further crimes of the defendant. I don't think we're going to have further crimes from the defendant.

To provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. That is not relevant here.

So we determined what the guideline range was, we determined 57 to 71 months. We stated what the statutory reasons, what the reasons congress has said were which we have to seriously consider, and the guidelines we have to consider. That is a big consideration, statutory reasons.

And I also have to consider the mitigation factors here; the 170 letters, or 175 letters I got, received, supporting Mahender Sabhnani, and saying how **[Page 45]** great a guy he was, and charitable, and things like that. Supporting an orphanage for many years. Mitigation. Yes, do I consider the letters?

Are they the most important factor? Absolutely not. But they are something to consider.

The main consideration in mitigation of a man who was convicted of 12 serious crimes, and never participated virtually in nothing. He participated in almost none of the acts, except maybe the passport. But was there, saw, heard, and did nothing. Really for the bad part of this, was about two years when Enung came. Nothing.

* * *

APPENDIX H

UNITED STATES v. SABHNANI
(Case No. 08-3720-cr)
Judges: Miner, Sotomayor, Katzman
Prosecutor: Mark Lesko
Defense Attorney: Alan Dershowitz
November 14, 2008

[BEGINS 10:06:43]

ALAN DERSHOWITZ, ESQ.: May it please the court, Alan Dershowitz for Mahender Sabhnani. The trial court in this case found that "it is clear that Sabhnani does not pose a flight risk or a danger." The government concedes that there is no delay here. We, in fact, have our brief ready for submission, 90 pages long, a very substantial brief on the merits. The judge, however --

HON. SOTOMAYOR: Your defendant is still out?

ALAN DERSHOWITZ, ESQ.: He's out.

HON. SOTOMAYOR: He was granted a stay of surrender pending this hearing?

ALAN DERSHOWITZ, ESQ.: Yes, and until Monday and we have an application for further stay in the event the court takes it under advisement. The government concedes there is no delay here. The only issue is the legal conclusion reached by the lower court --

HON. SOTOMAYOR: No there's two, and your reply brief addresses only one, the substantial question. They say there is a third prong, and that is

whether exceptional circumstances exist, and you don't address that. So do pay some attention to that prong as well.

ALAN DERSHOWITZ, ESQ.: Your Honor, we do address it, and we address it particularly in reference to Judge Miner's decision in the DiSomma case where he integrates all of those together, and we raise this issue below. What Judge Miner held for the court in the DiSomma case is when you have a challenge on the merits which is related to the issue of crime of violence, that is the court found that this was a crime of violence. We argue on the merits of the appeal, that this is a crime of omission and that the failure of the judge to charge a duty to act relates the two together.

And what the court held in DiSomma is that "We conclude that were a defendant now to direct a substantial challenge on appeal to the factual underpinnings of the element of the violence upon which a sole conviction stands or falls, then it becomes an exceptional circumstance."

HON. SOTOMAYOR: Let me stop and break down the argument here.

ALAN DERSHOWITZ, ESQ.: Sure.

HON. SOTOMAYOR: I understand your argument about omission, and I will question the government more closely on its theory of the case.

ALAN DERSHOWITZ, ESQ.: Right.

HON. SOTOMAYOR: But what do you think is necessary to establish commission in a situation like this one where it is a husband and wife employing individuals --

ALAN DERSHOWITZ, ESQ.: Well, first of all --

HON. SOTOMAYOR: --and the services being rendered by those individuals are being rendered to both. And I agree that perhaps one is the physical actor, i.e., the abuser, but the other is aware of and presumably participating at least to the extent of making whatever payment, however de minimis it might be, to these abused servants.

ALAN DERSHOWITZ, ESQ.: Your Honor, first of all, our only burden on this appeal is to show that this is a close question and it could go either way. And this is a close question. It's a case of first impression in this circuit.

Our position is at the very least, the judge must instruct the jury on facts it must find in order to establish a duty. The judge can't simply establish the duty himself, and in fact --

HON. SOTOMAYOR: Well, there doesn't have to be a duty. There have to be facts from which participation or agreement to join the conspiracy or to aid and abet the conspiracy must be given.

ALAN DERSHOWITZ, ESQ.: [INAUDIBLE COMMENT].

HON. SOTOMAYOR: So you're talking about if it's going to give a charge of omission, that it has to give a charge of duty as well?

ALAN DERSHOWITZ, ESQ.: But yes. And he did give a charge of omission. That's the key point.

HON. SOTOMAYOR: All right.

ALAN DERSHOWITZ, ESQ.: The judge said that you can find aiding and abetting, and essentially therefore conspiracy based on an omission to do a duty. The judge felt very strongly in this case that there was a duty. He made such a finding, but he

never gave the jury the facts from which they had to conclude that.

In the Pope case, the leading case on this issue of omission an duty, the court reversed because of a failure of such instruction. When you have a husband and wife situation, it's particularly difficult because the husband also has a duty not to report his wife. A husband also has a duty in relation to confidentiality, and the facts of this case show an effort to hide from the husband everything that was going on.

In fact, the court made a finding below that he did nothing. That was his essential crime, doing nothing. That can't be a crime of violence either.

HON. KATZMAN: Could I ask you to address the extraordinary circumstances point? The district judge had previously determined that in essence there were extraordinary circumstances which justified keeping your client out and then apparently changed his mind as to the extraordinary circumstances.

ALAN DERSHOWITZ, ESQ.: Right. But he failed to address our argument. Our argument on page two of our brief below was the Judge Miner argument essentially. The argument that the extraordinary circumstances were not the situation involving the family in the business. Yes, he could take that into consideration, but we argued below that the extraordinary circumstance was the fact that we were challenging the very concept that the judge found made this a case of a crime of violence.

HON. KATZMAN: I take -- I take that point, but I also -- I understood you to say -- and I'm quoting on page 20 -- "Given the current economic difficulties and credit crisis, and despite the efforts that have

been through his eldest daughter, Pooja, to assume control of the business, it is reasonably clear that without Mahender Sabhnani's personal presence and involvement, its continued existence and profitability are in doubt.

ALAN DERSHOWITZ, ESQ.: We made that argument as well Your Honor. We made a series of arguments about exceptional circumstances.

The Ninth Circuit recently held that exceptional circumstances could also be the fact that there is no possible danger or risk, and the court has found that. And because of the monitoring in this situation, there is no conceivable possibility that this man can engage in acts of violence.

HON. MINER: But your basic argument -- your basic argument is that you don't have to show exceptional circumstances under these -- under the facts of this case because it's your contention that you're dealing with omission.

ALAN DERSHOWITZ, ESQ.: We're dealing with omission. Not only that, but the very crime itself, even if one takes a categorical view, which the court has said you should take, after the Supreme Court in the Kozminski case said that this crime is a crime of violence, Congress amended that. Congress made this crime into a non-crime of violence. And we cite cases where the court has said, "You don't have to be in any way violent."

And the judge's instruction in this case said, "You need not find violence or threat of violence." So whether one takes a categorical view under the statute or a case-specific view, this is not a crime of violence, and if it is, there are exceptional circumstances.

And one of the exceptional circumstances is that there is no conceivable possibility this man could ever commit violence because of the special monitoring that this court imposed.

So all the cost and benefit analysis suggests that if we are right and we win the appeal -- which we think we have a substantial chance to do on the merits -- and he goes to jail, he doesn't get his time back, whereas if we're wrong, the government gets his full time. There is no risk to the community. There is no danger to the community. There is no danger of flight, so all the considerations opt in favor of bail pending appeal.

HON. KATZMAN: And you're ready right now to file your brief?

ALAN DERSHOWITZ, ESQ.: We will file a brief tomorrow. We could argue the case within 30 days. The government's position, of course, is this is not a substantial appeal, so they shouldn't be heard to argue for delay in the 30 days. We could argue this case in December. We could argue this case literally today if we had to.

But there is no reason why he should go to jail pending appeal on this matter. It's a serious, serious issue on appeal.

HON. SOTOMAYOR: Thank you counsel.

ALAN DERSHOWITZ, ESQ.: Thank you so much Your Honor.

HON. SOTOMAYOR: Counsel, without cite in your submissions to us, you say there is abundant evidence of acts of commission as opposed to omission. Would you give me a list of what those affirmative acts are and cite me to the trial record? I'm par-

ticularly interested in your allegation that this gentleman reported infractions by the servants to his wife so she could punish them.

Could you please tell me where that evidence is.

MARK LESKO, ESQ.: Yes Your Honor, and may it please the court --

HON. SOTOMAYOR: I obviously didn't have in the short amount of time you gave in submitting your reply -- your response -- and I don't fault you. This motion was expedited -- didn't have time to read the entire trial record, and you didn't give us a cross cite.

MARK LESKO, ESQ.: Yes Your Honor, thank you. Mark Lesko for the appellee United States. And good morning. I will list specifically for Your Honor, and I would point Your Honor -- and if I have a moment I could provide the transcript cites because they were cited in Judge Spatt's rule 29 decision where he cited the transcript citations for all of the various facts that indicated that Mahender Sabhnani engaged in affirmative conduct.

I would note parenthetically that in that opinion, Judge Spatt indicated that a reasonable jury could have found that Mahender participated in some of these cruel acts and that he wanted them to happen and that his efforts --

HON. MINER: Well we're looking for some concrete examples. Could you pass to that please?

MARK LESKO, ESQ.: Yes Your Honor. Mahender Sabhnani obtained both servants at the airport. He picked them both up at the airport. Their immigration documents were stored in a closet

that was off of his shared bedroom with his wife. He on a daily basis received their labor.

There were two specific instances where witnesses testified about observing Mr. Sabhnani receiving, obtaining the labor from the servants, specifically an electrician, Will Hespeler, testified about seeing Samirah walking behind Mahender Sabhnani in rags -- dressed in rags carrying a tray full of beverages.

A gardener, Anthony Pascarella, testified --

HON. MINER: Are you saying that these are violent acts?

MARK LESKO, ESQ.: I'm saying that in terms of affirmative conduct, Mr. Sabhnani, who was the owner of the home, whose business was in the home, received the labor on a daily basis from these women. And the impetus, or the cause or the reason that these women were laboring for him was because of the violent coercive state of servitude that they were in. And they were in that state of servitude based upon the violent acts primarily of Varsha Sabhnani, the wife, and the series of punishments. There -- Mr. Sabhnani observed these injuries. There was an incident where Enung was being punished for eating chocolates, and Mahender Sabhnani observed her being punished by being ordered to stand in the same place for an entire day. And Mahender Sabhnani laughed at her while she was being punished.

There was the incident of a statue, a very heavy bronze statue that was being placed on a pedestal near the Sabhnanis' swimming pool and Mr. Pascarella, the Sabhnanis' regular gardener, offered to move the statue from a basement area to the outside

pedestal and Mr. Sabhnani indicated that the women could handle it.

Mr. Pascarella testified about how he observed these two very, very small women struggling to carry a very heavy bronze statue onto the pedestal.

There was the incident when Mr. Sabhnani observed Samira sleeping in a bathroom on the floor and reported that incident to his wife, and soon thereafter Samirah was physically punished by Varsha Sabhnani.

There was an incident -- there was testimony that Mahender Sabhnani observed the servants eating garbage out of the garbage can in the home. There were photographs --

HON. SOTOMAYOR: Counsel, you are -- most of your litany with the exception of sleeping on the floor are still acts of omission. And your adversary has -- has the act of omission being not that he participated in inflicting the punishment or encouraging it -- the only exception being the one relating to sleeping on the floor.

But everything else is an act of omission. And the question is why a charge indicating that the jury had to find a duty of some sort wasn't appropriate. I don't doubt that the jury may have well had reasonable grounds to find him guilty. The issue is whether an erroneous charge, if one existed, contributed to the verdict in some way.

And given that most of your argument is centered around omissions, how can we tell what basis the jury convicted on?

MARK LESKO, ESQ.: Well, Your Honor, I would respectfully disagree that the only incident of

commission, shall we say, is the reporting of the sleeping --

HON. SOTOMAYOR: Well see, now you're arguing what you needed to argue to the jury. And you may well have --

MARK LESKO, ESQ.: We did argue this. We argued it in summation.

HON. SOTOMAYOR: Yeah, and -- but their argument is that the judge should have argued the duty question to the -- should have charged the jury with finding a duty.

MARK LESKO, ESQ.: Well Your Honor, two points in response. First, we believe the aiding and abetting instruction was correct. It reflected the elements of aiding and abetting that are provided in Zambrano and other opinions. Indeed, Judge Spatt cited, I believe, the Smith's opinion and Labat -- this court's opinion on Labat on the formulation of the elements of aiding and abetting.

Leaving that aside, I would ask Your Honor to consider the Fourth Circuit's opinion in Bonetti. In Bonetti, although that case addressed the issue of a statutory sentencing enhancement for serious bodily injury in the context of a harboring of aliens count, the jury in that case needed to find that element beyond a reasonable doubt.

And in Bonetti, the Fourth Circuit, Judge Luttig, indicated that a duty that is virtually identical to the duty that we contend exists here existed in Bonetti. And there is no indication in that opinion that the trial court, the district court --

HON. SOTOMAYOR: So do you think the finding of that duty is a legal question, not a factual question? That's really what the issue is.

MARK LESKO, ESQ.: Your Honor --

HON. SOTOMAYOR: There's -- assuming that you are correct, that there is a duty here, isn't that still an element that must be charged to the jury for it to find, that the circumstances were, as you said, ones that created a duty?

MARK LESKO, ESQ.: And I think that's the precise issue that we'll be addressing in detail in our papers --

HON. MINER: So it's not a settled issue? You don't think it's a settled issue? Or is it a settled issue?

MARK LESKO, ESQ.: My instincts tell me that it's a matter of law and not an issue that would be presented to the jury for resolution. It's not a factual issue that the jury would have to render a verdict.

HON. MINER: That's what we call a close question.

MARK LESKO, ESQ.: But Your Honor, I would note that to -- in DiSomma, that the standard is higher because in DiSomma by conflating the extraordinary circumstance and the substantial question prongs of the standard, I think that this court indicated that the standard is actually that the court needs to determine if an unusual factual and legal question is presented.

In other words, it's a substantial question in the presence of one or more remarkable and uncommon factors. So a substantial question plus, in other words. And I would also --

HON. SOTOMAYOR: And you don't -- you seriously can't be arguing that there is any case quite like this one in which a court has ruled that A, a duty exists at all or B, that it's a legal question instead of a factual one that goes to the jury. Aren't those decisions that we'll be making for the first time in this case?

MARK LESKO, ESQ.: In this circuit.

HON. SOTOMAYOR: In this circuit.

MARK LESKO, ESQ.: In the Fourth Circuit, they have resolved the issue of the duty. And in my opinion, necessarily resolved the issue of whether or not a failure to instruct a jury on whether or not such a duty existed amounted to reversible error.

HON. MINER: Well, that shows that it's not a close question in the Fourth Circuit anymore.

MARK LESKO, ESQ.: That's our position.

HON. KATZMAN: But in this circuit, there is nothing.

MARK LESKO, ESQ.: Admittedly, there is none.

HON. KATZMAN: Let me ask you, if this appeal were expedited, if your adversaries filed on Monday, that would be the 20th of -- the 17th of November. That would mean 30 days would bring you to the 15th of December. Then you would have time for a reply brief of about a week. You think you would need about a week?

ALAN DERSHOWITZ, ESQ.: [INAUDIBLE COMMENT].

HON. KATZMAN: And that -- during that period, the court will be on break. So that brings us to

around the week of January 12 if we were to have an expedited appeal.

HON. SOTOMAYOR: It would.

MARK LESKO, ESQ.: Your Honor, we're optimistic that we'll not have to file for an extension of time. Even if we were to do that, it's a very long trial record, as Your Honors can appreciate, and more importantly, a very long brief. It appears to be a very long brief, an oversized brief, and two briefs, in fact.

So we are going to work overtime to comply with the court's timing deadlines. If we were to ask for an extension, it would be for a very brief one. We appreciate the issues as well as Your Honors do in terms of speed.

HON. SOTOMAYOR: We have conferred and our granting the motion for bail pending argument on this -- on the motion -- on the full motion, on the full appeal.

We're going to expedite the appeal according to the schedule just discussed with you by Judge Katzman. The clerk of the court will notify you in due course, hopefully within the next week or so, on an argument date.

Counsel, how much of an extension we would be willing to give will very much depend on the argument date we find for you.

MARK LESKO, ESQ.: Very well Your Honor.

HON. SOTOMAYOR: If it's close to the 12th, you're not going to have much play. If it's a little further out, you will.

MARK LESKO, ESQ.: Very well.

HON. SOTOMAYOR: I would suggest that if you want a more reasonable schedule, now that we've left the defendant out on bail, your opponents may not object. If you want a more reasonable schedule, then advise the clerk of the court by the end of the day --

MARK LESKO, ESQ.: Yes, Your Honor.

HON. SOTOMAYOR: -- of what the new briefing schedule will be and the clerk will then set argument in accordance with that new schedule.

MARK LESKO, ESQ.: Thank you, Your Honor.

HON. SOTOMAYOR: All right. Thank you. We'll reserve decision. By the way, if it is not self-evident, we are ruling on the basis that there is a substantial question in this circuit and that given the unusualness of the case, that exceptional circumstances do exist, we rely on the findings of the district court that this defendant is not a risk of flight or a danger to the community at this time.

MARK LESKO, ESQ.: Thank you.

HON. SOTOMAYOR: Thank you.

[ENDS 10:27:25 AM]

[END]

APPENDIX I

08-3720-cr(L)
08-3731-cr(CON)

To Be Argued By:
MONICA E. RYAN

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

—against—

MAHENDER MURLIDHAR SABHNANI,
VARSHA MAHENDER SABHNANI,
Defendants-Appellants.

On Appeal From The United States District Court For The Eastern District of New York

BRIEF FOR THE UNITED STATES

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Eastern District of New York.

DAVID C. JAMES,
MONICA E. RYAN,
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Assistant United States Attorneys,
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* * *

B. The Instruction Was Proper

To the extent that the emphasized language in the court's charge permitted the jury to convict on an aiding and abetting theory based upon a failure to act,[15] it was legally correct. Notably, while Mahender contends (MSBr. 39) that this language is contrary to the requirement of "affirmative conduct" and an "overt act" in the model instruction on aiding

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15 Although the parties and the district court interpreted the charge in this manner (see MSA 102-104e), the charge viewed in its entirety required that the defendant must "seek by some act to help make the crime succeed" and must "act in a way which is intended to bring about the success of the criminal venture." (MSA 476-77) (emphasis added). Further, the charge required the jury to find, inter alia, that the defendant sought "by her or his actions to make the criminal venture succeed." (MSA 477) (emphasis added). Finally, the instruction specified that "mere presence" and "mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge" was insufficient. (MSA 477). The language concerning "a failure to act" related to the issue of whether "[p]articipation in a crime is willful." (MSA 476). Thus, the charge allowed the jury to infer willfulness from a failure to act but did not say that a failure to act alone was sufficient to constitute aiding and abetting.

and abetting in 1 L. Sand et al., Modern Federal Jury Instructions, ¶ 11.01, Inst. 11-2 (2007)), this same model instruction contains language substantially similar to that given by the district court, see id. ("Participation in a crime is willful if done voluntarily and intentionally, and with the specific intent to do something which the law forbids or with the specific intent to fail to do something the law requires to be done") (emphasis added).[16]

Moreover, the emphasized language is consistent with the opinions of this Court, which have recognized that aiding and abetting may be predicated upon a failure to act. While Mahender may be correct that none of the cases involved a challenge to this specific language in a jury charge (MSBr. 41), the Court has stated this principle repeatedly. For example, United States v. Pipola, 83 F.3d 556, 562 (2d Cir. 1996), stated that, to convict on an aiding and abetting theory, "[t]he government must ... prove the underlying crime was committed by someone other than the defendant and that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime." (emphasis added); see also United States v.

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16 Judge Sand's treatise states that this particular language is appropriate "[i]f willfulness is charged." The commentary explains that, while "traditionally" the second element of aiding and abetting "was expressed as requiring that the defendant willfully associate himself with the offense," some courts have "moved away from requiring willfulness to a more nuanced position aligning the required scienter of the aider and abettor with the knowledge and intent of the principal." In this case, there is no dispute that the district court properly charged a willfulness standard

Sanders, 211 F.3d 711, 722 n.1 (2d Cir. 2000) ("one who aids and abets must have engaged in 'a voluntary act or omission' with 'the specific intent that [such] act or omission bring about the underlying crime.'") (quoting United States v. Zambrano, 776 F.2d 1091, 1097 (2d Cir. 1985)) (emphasis added, brackets in Sanders); United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990) ("the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime.") (emphasis added); United States v. Wiley, 846 F.2d 150, 154 (2d Cir. 1988) (listing elements of aiding and abetting as, inter alia, "a voluntary act or omission by the person charged as an aider or abettor, with . . . the specific intent that his act or omission bring about the underlying crime.") (emphasis added); United States v. Perry, 643 F.2d 38, 46 (2d Cir. 1981) (same).

Mahender nevertheless contends a failure to act cannot provide a basis for liability in the absence of an express statutory duty to act. (MSBr. 31-37). However, even assuming that such a requirement exists, it was satisfied. The substantive charges in this case included obtaining "the labor or services of a person" by unlawful means, 18 U.S.C. § 1589; holding a person "in a condition of peonage," 18 U.S.C. § 1581; "conceal[ing], remov[ing], confiscat[ing], or possess[ing]" immigration documents in the course of committing the forced labor and peonage offenses, 18 U.S.C. § 1592; and harboring aliens, 8 U.S.C. § 1324(a)(1)(A)(iii). In the circumstances of this case, these statutes created an affirmative duty to act, which the jury could find that Mahender violated.

As noted, § 1592, pertaining to "document servitude," prohibited not only the confiscation of the maids' immigration documents but also their concealment and possession. The maids' immigration documents were kept in a locked cabinet in the closet of the bedroom Mahender shared with Varsha. (T 1051-54, 1284, 1311-12, 1320-22). Mahender plainly had access to the cabinet -- as evidenced by the fact that it also contained his own immigration documents -- and therefore he and Varsha jointly possessed the maids' immigration documents. In these circumstances, assuming (as the court instructed was required and the jury by its verdict found) that such possession and concealment was knowing, § 1592 created an affirmative duty to take some action so that he was no longer concealing and possessing them. Moreover, by his failure to act as § 1592 required, Mahender aided and abetted not only the document servitude offenses but also the forced labor, peonage and harboring offenses, since the maids needed their immigration documents if they were ever to leave the defendants' service and return to their native country.

A duty to act also arose under the forced labor and peonage statutes based upon Mahender's relationship with the maids. Mahender, no less than Vasha, was the maids' employer. He was the coowner of the property in which the maids were confined and performed their labors. He personally received the benefit of their labor on a daily basis. In this context, Mahender had an obligation to act once he knew that Varsha was holding the maids in peonage and employing threats, violence and other coercive means to force the maids to labor on his behalf. The duty he violated was not to prevent Varsha from "mistreating household staff." (MSBr. 41). Rather, it

was the duty, created by statute, not to continue to obtain the maids' labor for his own benefit through unlawful means.

The harboring statute also imposed an affirmative duty on Mahender to act in the circumstances of this case. The court's instructions properly defined harboring as "afford[ing] shelter to" an illegal alien. (MSA 512). Thus, assuming (as the instructions required (MSA 511) and the jury obviously found) that Mahender knew that the maids remained in the United States illegally, he violated a statutory duty by continuing to afford them shelter in his house.

Mahender also had a non-statutory duty to act under principles recognized by United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002), which had facts uncannily similar to this case. In Bonetti, the defendant was convicted of harboring a foreign-born domestic servant who was physically abused repeatedly by the defendant's wife. Id. at 445-46. While the defendant himself did not physically abuse the servant, he failed to provide her with medical care for a leg infection and a uterine fibroid. Id. at 447. The victim, though not a member of the defendants' family, "lived under the same roof as [defendant] for almost fifteen years, and her illegal status, illiteracy, ignorance of English, and lack of money rendered her completely dependent upon [defendant] for her well being and survival." Id. Based upon this evidence, the jury found that "'during and in relation to' the conspiracy and harboring [the defendant] 'cause[d] serious bodily injury . . . to, or place[d] in jeopardy the life of, a[] person' within the meaning of 8 U.S.C. § 1324(a)(1)(B)(iii)," id. at 446, which finding increased the statutory maximum sentence to 20 years.

The Fourth Circuit rejected the defendant's challenge to the sufficiency of the evidence for the conviction for the aggravated form of harboring involving serious bodily injury. Specifically, the court ruled that the husband had a "legal duty to help [the victim] obtain prompt medical care," noting that she was

> as helpless and as dependent on [the defendant] as a child living in his house would have been. See State v. Miranda, 245 Conn. 209, 715 A.2d 680, 687 (1998) (finding a duty to protect live-in girlfriend's child from abuse); Davis v. Commonwealth, 230 Va. 201, 335 S.E.2d 375 (1985) (upholding the conviction of a woman for involuntary manslaughter in the death by starvation and exposure of her elderly mother, who lived in the same house); see also 1 W. LaFave and A. Scott, Substantive Criminal Law § 3.3(a) ("[I]f two people, though not closely related, live together under one roof, one may have a duty to act to aid the other who becomes helpless.").

Id. at 447.[17] The court further stressed that, "[m]ost importantly, [the defendant] created a circumstance of forced dependency by [the victim] through his own conduct of retaining [her] passport in his possession, refusing to renew her visa after it expired, and refusing to pay her for her work." Id. at 448 (emphasis in original). The court went on to note that "a reasonable jury could infer a criminal mens rea from [the defendant's] neglect for [the victim's] health," which suggested "a desire to conceal his crime of harboring an unlawful alien . . ." Id.[18]

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[17] Mahender also argues that if such a duty arose, the jury needed to be instructed on the need to find a legal duty of care, relying principally on Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962). (MSBr. 37-38). However, Mahender never asked for such an instruction in district court and therefore forfeited the argument. Moreover, there is no indication that the district court in Bonetti provided such an instruction. Further, Jones is distinguishable because there the "failure to perform [a] legal duty of care" was an element of the offense of involuntary manslaughter. Id. at 308. In addition, it is axiomatic that the existence of a duty is a question of law, not a factual determination for a jury. See Alfaro v. Wal-Mart Stores, Inc., 210 F.3d 111, 114 (2d Cir. 2000) ("The question of the existence and scope of an alleged tortfeasor's duty is in the first instance, a legal issue for the court to resolve."); United States v. FMC Corporation, 572 F.2d 902 (2d Cir. 1978) (citation omitted) (affirming conviction of a corporation under the Migratory Bird Treaty Act after imposing strict liability on corporation for failing to prevent escape into a pond of toxic chemical that killed birds); cf. United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976) (discussing situation where the district court allowed jury to decide question of whether duty existed).]

[18] Mahender attempts to distinguish Bonetti by noting that the case involved a challenge to the sufficiency of the evidence rather than a jury charge, that the husband was convicted on a "Pinkerton" theory, and that the case did not charge forced la-

In sum, Mahender had statutory duties not to possess and conceal the maids' immigration documents, not to obtain the labor of the maids through illegal means and not to continue to afford shelter to the maids in his house when he knew that they were in the country illegally. Once he began violating these obligations, the statutes required him to act to change the status quo to bring his conduct into conformity with the law. Further, under the analysis in Bonetti, he had a non-statutory duty to assist Samirah and Enung, who were kept in a "circumstance of forced dependency."

Finally, Mahender's purported concern that the recognition of such duties to act would create potentially vast and uncertain responsibilities for employers of domestic servants (MSBr. 34-36) ignores that the aiding and abetting charge required that the failure to act had to be willful, i.e., that the defendant failed to act "with the specific intent to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or to disregard the law." (MSA 476). Further, the instruction made clear that mere knowledge of or acquiescence in Varsha's illegal conduct was insufficient. (MSA 477). As the Supreme Court has stated:

> The requirement that the act must be willful or purposeful may not render certain, for all

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[Footnote continued from previous page]

bor, peonage or document servitude offenses. (MSBr. 41-42 n.20). However, none of these distinctions is relevant to the point for which the case is cited, namely, the recognition of a non-statutory legal duty to act in circumstances similar to those of this case.

> purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Screws v. United States, 325 U.S. 91, 102 (1945). Thus, as long as the defendant is "consciously behaving in a way the law prohibits . . . such conduct is a fitting object of criminal punishment." United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978).

* * *

Supreme Court, U.S.
DEC 14 2010
OFFICE OF THE CLERK

No. 10-475

In the Supreme Court of the United States

MAHENDER MURLIDHAR SABHNANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it need not conduct harmless-error review because the aiding-and-abetting instructions as a whole clearly and accurately apprised the jury of the applicable law and thus were not erroneous.

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In the Supreme Court of the United States

No. 10-475

MAHENDER MURLIDHAR SABHNANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 599 F.3d 215. The opinion of the district court denying petitioner's motion for a judgment of acquittal (Pet. App. 88a-117a) is reported at 539 F. Supp. 2d 617.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2010. A petition for rehearing was denied on May 12, 2010 (Pet. App. 118a-119a). On July 16, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 11, 2010, and the petition was filed on October 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner (along with his wife, Varsha Sabhnani) was convicted of obtaining the labor of others by force or threat of force, in violation of 18 U.S.C. 1589(a); harboring aliens, in violation of 8 U.S.C. 1324(a)(1)(A)(iii); holding others in a condition of peonage, in violation of 18 U.S.C. 1581(a); document servitude, in violation of 18 U.S.C. 1592(a); and conspiring to commit each of those substantive offenses, in violation of 18 U.S.C. 371 and 8 U.S.C. 1324(a)(1)(A)(v)(I). Pet. App. 3a. The convictions stemmed from petitioner's mistreatment of two Indonesian domestic servants, Samirah and Enung, who were forced to labor and subjected to abuse in petitioner's residence. *Id.* at 90a. Petitioner was sentenced to 40 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3a. The court of appeals affirmed. *Id.* at 1a-87a.

1. Petitioner, a naturalized United States citizen from India, and his wife, Varsha, a naturalized United States citizen from Indonesia, arranged for two Indonesian women to travel to the United States to work for them illegally as domestic servants. Pet. App. 4a-5a. Samirah, a 53-year old woman from Indonesia who did not speak English, traveled with Varsha's mother to the United States in 2002. *Id.* at 5a. Petitioner and Varsha met Samirah at the airport and drove her to their house, where Varsha took Samirah's passport and other documents and locked them away until April 2007, after the passport had expired. *Id.* at 5a-6a. During that period, Samirah worked as a domestic servant for petitioner and Varsha, performing chores in their house and in peti-

tioner's office, which was located inside the house. *Id.* at 6a, 91a.

Petitioner and Varsha did not provide Samirah with a bed to sleep in; nor did they provide her with adequate food, clothing, or opportunities to sleep. Pet. App. 6a-7a. Samirah was forced to eat food from the garbage, and she wore clothes made from old rags. *Ibid.* She also experienced "extremely harsh physical and psychological treatment." *Id.* at 7a. For example, Varsha beat Samirah with a rolling pin and other household objects, burned her with scalding water, mutilated her ears, and cut her body and face with a knife. *Id.* at 7a-8a. As punishment for various infractions, Varsha forced Samirah to eat large quantities of chili peppers until she vomited or lost control of her bowels, to walk up and down flights of stairs, and to take numerous baths while clothed and then work in the wet clothes. *Id.* at 8a, 91a-92a. Varsha told Samirah that petitioner would kill her if she resisted. *Id.* at 8a. When Samirah asked to return to Indonesia, Varsha told her that she would have to pay the travel costs, and Varsha told Samirah that if she ran away, her children would be killed and Varsha would report her to the police. *Id.* at 9a.

Petitioner often scolded Samirah and ordered her to undertake various tasks, including cleaning the bathroom in his office and performing housework at another residence. Pet. App. 9a, 95a. Petitioner also witnessed Samirah's injuries and observed her eating from the trash, sleeping in the bathroom, and wearing wet rags. *Id.* at 10a-11a, 95a. Petitioner would tell Varsha about misdeeds that he perceived Samirah to have committed, and Varsha would then inflict physical punishment upon Samirah. *Id.* at 10a, 95a.

In late 2004 or early 2005, Enung, a 47-year-old woman from Indonesia who did not speak English, traveled to the United States with Varsha's sister and brother-in-law to work illegally for petitioner and Varsha. Pet. App. 11a. As with Samirah, petitioner and Varsha met Enung at the airport and drove her to their house, where Enung's passport and travel documents were confiscated and locked away until they were discovered by the police in mid-2007. *Ibid.* Like Samirah, Enung was denied adequate food, sleep and necessary medical care. *Ibid.* Varsha also subjected Enung to beatings and other physical and psychological abuse. *Id.* at 12a-13a, 92a-93a. On one occasion, petitioner watched and laughed while Enung was punished. *Id.* at 95a, 114a.

One of petitioner's business employees observed some of Samirah's injuries, provided the women with food, and mailed letters from the women to their families detailing their abuse. Pet. App. 13a-15a, 96a. Other employees saw Samirah wearing rags and, along with petitioner, watched the women perform manual labor around the house. *Id.* at 95a-96a.

Samirah eventually escaped and was taken to a hospital, where her treating physician diagnosed "[m]ultiple physical abuse." Pet. App. 16a (citation omitted). After the police were notified, authorities searched petitioner's house and rescued Enung. *Id.* at 16a-17a.

2. Petitioner and his wife were indicted on charges of forced labor, harboring aliens, peonage, document servitude, and conspiracy to commit each of those four substantive offenses. Pet. App. 90a. The district court conducted a seven-week trial, during which the jury heard testimony from Samirah and Enung, other employees of petitioner, the physician who treated Samirah

after her escape, and law enforcement officers. *Id.* at 13a, 19a.

In its instructions on the substantive offenses, the court told the jury that, in addition to the possibility of finding either defendant guilty as a principal, the jury could also find a defendant guilty under an aiding-and-abetting theory. 12/11/07 Tr. 5034-5037 (forced labor); 12/12/07 Tr. 5074-5077 (harboring aliens); *id.* at 5099 (peonage); *id.* at 5120 (document servitude). In that regard, the court instructed the jury that

> [i]n order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate herself or himself in some way with the crime and that she or he willfully and knowingly seek by some act to help make the crime succeed.
>
> Participation in a crime is willful if action is taken voluntarily and intentionally or in the case of a failure to act with the specific intent to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or to disregard the law.
>
> The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. * * *
>
> * * * An[] aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

Pet. App. 134a (12/11/07 Tr. 5035-5036).

Thereafter, the court instructed the jury to ask the following questions when determining whether a defendant aided and abetted the commission of a crime:

> Did the defendant participate in the crime charged as something she or he wished to bring about?
>
> Did the defendant associate herself or himself with the criminal venture knowingly and willfully?
>
> Did the defendant seek by her or his actions to make the criminal venture succeed?

Pet. App. 134a-135a (12/11/07 Tr. 5036).

The court explained that if the jury's "answer to any one of these series of questions is no, then the defendant is not an aider and abettor and you must find him or her not guilty as to aiding and abetting." Pet. App. 135a (12/11/07 Tr. 5037). The jury found petitioner and his wife guilty of all the charges against them. *Id.* at 20a, 97a.

3. Petitioner moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). Pet. App. 89a. Petitioner raised various challenges to the sufficiency of the evidence, including a claim that the evidence was insufficient to find him guilty as an aider and abettor based on a failure to act because there was no evidence that he had a duty to act and failed to do so. *Id.* at 115a. The district court denied petitioner's motion. *Id.* at 88a-117a. As relevant here, the court ruled that "despite [petitioner's] claim that he could not be guilty as an aider and abettor for failing to act because he had no duty to act," "there was sufficient evidence at the trial to prove that [petitioner] affirmatively acted with the specific intent to advance the crimes" charged. *Id.* 116a. The court found that petitioner "permitted and, to some extent, participated" in the "deplorable

conditions as to Samirah and Enung." *Ibid.* The court further found that petitioner's actions "aided the underlying criminal endeavors" and that he "took affirmative action in support of the crimes charged." *Ibid.*

The district court sentenced petitioner to concurrent prison terms of 40 months on each of the 12 counts of conviction, including the conspiracy counts. Judgment 3. The court also sentenced petitioner to three years of supervised release following his imprisonment, a $12,500 fine, and a $1200 special assessment. Judgment 4, 6, 7. The court further ordered that petitioner pay restitution to the victims and forfeit his ownership interest in the house where the offenses were committed. Judgment 5.

4. On appeal, petitioner challenged the validity of the aiding-and-abetting instructions. Pet. App. 30a. In particular, he argued that the portion of the instructions addressing willfulness permitted the jury to find him guilty for failing to act and that he could not validly be convicted on that basis because the criminal statutes under which he was charged do not predicate liability on a failure to act and the jury was not told that he had any common law duty to act. *Ibid.*

The court of appeals rejected petitioner's challenge and affirmed his convictions. Pet. App. 1a-87a. The court noted that an allegedly erroneous jury instruction warrants reversal only where there is "both error and ensuing prejudice." *Id.* at 31a (citation omitted). The court explained that an instruction is erroneous if, when viewed as a whole, it "either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." *Ibid.* (citation omitted). The court also noted that "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the

context of the overall charge." *Ibid.* (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)).

The court of appeals stated that it found "dubious" the government's argument that, assuming that the aiding-and-abetting instructions permitted the jury to find petitioner guilty based on a failure to act, that would have been a valid basis for conviction. Pet. App. 31a; see *id.* at 31a-34a. The court concluded, however, that it "need not decide the question whether in the circumstances of this case [petitioner] could properly be convicted based upon an omission to act," because the court "reject[ed] [petitioner's] claim that the district court's instruction on willfulness, considered in the context of the aiding and abetting instruction as a whole, rendered the instructions so confusing as to permit the jury to convict him on this basis." *Id.* at 34a. Instead, the court of appeals found that "the aiding and abetting instruction, considered as a whole, adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting." *Id.* at 39a.

The court of appeals observed that the challenged portion of the instruction—which explained that participation in a crime is "willful" not only when "action is taken voluntarily and intentionally" but also "in the case of a failure to act, with specific intent to fail to do something the law requires"—"was not inaccurate," but only "extraneous to this case." Pet. App. 34a. And the court concluded that the remainder of the instruction "was perfectly clear" that the jury could find petitioner guilty only if he affirmatively acted to assist the crimes, thus "removing the possibility of any confusion on the jury's part." *Id.* at 37a.

The court of appeals noted that "immediately before the instruction on willfulness, the jury was informed

that '[i]n order to aid or abet another to commit a crime, it is necessary that the defendant * * * seek *by some act* to help make the crime succeed." Pet. App. 34a-35a (quoting Tr. 12/11/07 5035). In addition, the court observed, "[i]mmediately after the challenged language, the jury was instructed that the 'mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by the defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting.'" *Id.* at 35a (quoting 12/11/07 Tr. 5036). The court also noted that the need for affirmative action by the defendant "was further stressed in the judge's summary of the charge," which "instructed the jury to ask itself three questions to determine whether a defendant aided or abetted the commission of a crime," including: "Did the defendant seek *by her or his actions* to make the criminal venture succeed?" *Ibid.* (quoting Tr. 12/11/07 5036). The court of appeals therefore concluded that "the charge's repeated emphasis on the necessity of acting in order to aid and abet, coupled with the crystal clear summary, was sufficient to ameliorate any possible confusion that might conceivably have arisen from the willfulness instruction." *Id.* at 36a.

The court of appeals rejected petitioner's claim that the jury still could have been confused because, in its summation, the government stated that aiding and abetting can be accomplished by "[a] failure to act with specific intent, to fail to do something the law requires." Pet. App. 38a.[1] The court "agree[d] that a party's sum-

[1] The prosecutor argued:

You don't have to have actually committed the crime to be an aider

mation can heighten the *already present risk* that an erroneous jury instruction may mislead the jury." *Ibid.* But the court concluded "that situation is not this case." *Ibid.* The court explained that "the jury instructions, read as a whole, clearly apprised the jury of what it was required to find in order to convict," and made "clear that [petitioner] could not be convicted solely because he knew of [his wife's] crimes or acquiesced in her actions without acting himself." *Ibid.* "[T]o the extent the prosecutor's summation did misstate the applicable law," the court observed, petitioner "raised no objection" in the district court and did not independently challenge the summation in the court of appeals. *Ibid.*

Thus, the court of appeals found, "[t]his was not a case in which the jury instructions" were "such that the jury could have convicted based on a legally erroneous theory." Pet. App. 36a. Instead, the court concluded, "the instructions as a whole adequately conveyed to the jury the law it was to apply." *Id.* at 38a. Given that conclusion, the court of appeals determined that it "need not" consider whether the alleged instructional error was prejudicial. *Id.* at 38a-39a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or an-

---

and abettor. All that needs to be established is that somebody else committed the crime, and that you knowingly and willfully associated yourself with that other person in some way to help with the crime. Help with the crime. And that can be done by actions, or it can be done by a failure to act.

A failure to act with specific intent, to fail to do something the law requires.

Pet. App. 38a.

other court of appeals. This Court's review is therefore not warranted.

1. Contrary to petitioner's contention (Pet. 13-25), the decision below does not conflict with any of this Court's decisions providing for harmless-error review of instructional errors. Petitioner's claim that the court of appeals "performed only a truncated harmless-error review that failed to consider the entire record and neglected to place the burden on the government to disprove prejudice" (Pet. 19) rests on the mistaken premise that the court found that the aiding-and-abetting instructions were erroneous. In fact, the court of appeals found that the instructions were *not* erroneous because, "considered as a whole," they "adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting." Pet. App. 39a. "Given [the court of appeals'] conclusion that the instructions as a whole adequately conveyed to the jury the law it was to apply," the court correctly determined that it "need not" consider whether the alleged instructional error was prejudicial. *Id.* at 38a-39a.

None of the harmless-error decisions cited by petitioner (Pet. 14-16) supports the remarkable notion that the court of appeals was required to conduct harmless-error review of instructions that it had found were not erroneous. Each of the decisions involved a finding of instructional error. In *Neder v. United States*, 527 U.S. 1 (1999), the government conceded that the district court had erroneously failed to instruct the jury on an essential element of the crime charged. *Id.* at 8. In *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008), the lower courts had found, and the parties agreed, that the jury instructions erroneously permitted the jury to find the defendant guilty under a theory that was legally invalid.

Id. at 530-532. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), after concluding that instructional error had occurred at the defendant's trial, this Court remanded for the court of appeals to conduct harmless-error review. *Id.* at 2934. And, in *Yates* v. *Evatt*, 500 U.S. 391 (1991), the state Supreme Court had found that the instructions at the defendant's trial were constitutionally erroneous because they created mandatory rebuttable presumptions, and the State did not challenge that conclusion in this Court. *Id.* at 402.

The decisions establish that when a court has determined that the jury instructions were erroneous, and the error was of constitutional magnitude, the conviction may be upheld only "if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Neder*, 527 U.S. at 16 (citation omitted). And when harmless-error review applies, the government bears the burden of proving that the error was harmless. *United States* v. *Vonn*, 535 U.S. 55, 68 (2002). A reviewing court need not conduct harmless-error review, however, if the court finds that there has been no error. Because the court below found that, taken as a whole, the aiding-and-abetting instructions in this case were not erroneous, this Court's harmless-error cases are inapposite.[2]

[2] The Second Circuit routinely applies harmless-error review when it finds that jury instructions were erroneous. See, *e.g.*, *United States* v. *Jackson*, 196 F.3d 383, 384-389 (1999) (applying *Neder*'s harmless-error analysis after concluding that the trial judge erroneously failed to instruct jury on an essential element of the crime charged), cert. denied, 530 U.S. 1267 (2000). And the Second Circuit is well aware of the appropriate standard for harmless-error review. See, *e.g.*, *United States* v. *Goldstein*, 442 F.3d 777, 781 (2006) ("An erroneous instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."). Accordingly,

Petitioner incorrectly implies (Pet. 16) that the court of appeals concluded that the instructions were confusing and could have misled the jury. The court found that the small portion of the instructions challenged by petitioner—which addressed the meaning of "willful" "in the case of a failure to act"—was, although "not inaccurate," "extraneous to this case." Pet. App. 34a. After examining the instructions as a whole, however, the court concluded that the remainder of "the instructions clarified what was required to convict, and the judge's three-question summary of the charge was perfectly clear, removing the possibility of any confusion on the jury's part." *Id.* at 37a. Thus, far from concluding that the instructions were confusing, the court concluded that the "instructions, read as a whole, clearly apprised the jury of what it was required to find in order to convict." *Id.* at 38a; see *ibid.* (holding that the instructions "were clear that [petitioner] could not be convicted solely because he knew of [his wife's] crimes or acquiesced in her actions, without acting himself").

The court of appeals thus squarely and correctly rejected petitioner's contention that the instructions "permitted the jury to convict petitioner for a naked failure to act." Pet. 19. In reaching that conclusion, the court of appeals followed a long line of this Court's cases directing a reviewing court to consider a challenged instruction "not in isolation but in the context of the entire charge." *Jones* v. *United States*, 527 U.S. 373, 391-392 (1999) (citing *Bryan* v. *United States*, 524 U.S. 184, 199 (1998); *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926)). Consistent

this Court's review is not needed to correct the court of appeals' approach to harmless-error review of instructional errors.

with those cases, the court of appeals correctly examined the aiding-and-abetting instructions as a whole and concluded that their "repeated emphasis on the necessity of acting in order to aid and abet, coupled with the crystal clear summary [by the district court], was sufficient to ameliorate any possible confusion that might conceivably have arisen from the willfulness instruction." Pet. App. 36a. The court further concluded that, given the clarity of the instructions, any misstatement of the law by the prosecutor in his summation (to which petitioner did not object at trial) did not introduce any risk that the jury would be misled. *Id.* at 38a.

In short, as the court of appeals explained, "[t]his was not a case in which the jury instructions" were "such that the jury could have convicted based on a legally erroneous theory." Pet. App. 36a. Accordingly, cases (such *Neder*, *Pulido*, and *Skilling*) that address the harmless-error analysis that applies in that circumstance provide no reason for this Court to review the decision below.[3]

2. This Court's review is also not warranted based on petitioner's contention (Pet. 20-23) that the court below incorrectly applied the Court's decisions, such as *Cupp* and *Park*, governing the standard for assessing whether jury instructions are erroneous. That contention, like petitioner's harmless-error argument, rests on a misreading of the decision below. Although petitioner asserts that the court of appeals held that jury instruc-

[3] Because this case involves neither instructions that permitted the jury to find the defendant guilty based on a legally erroneous theory nor any other situation that calls for harmless-error review, the Court should also reject petitioner's alternative suggestion (Pet. 31) that it grant the petition, vacate the decision below, and remand in light of *Skilling*.

tions must be evaluated "in isolation from the rest of the trial record" (Pet. 20), the court held no such thing.

The court of appeals cited *Cupp* for "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp*, 414 U.S. at 146-147 (citation omitted); see Pet. App. 31a; *id.* at 34a. The court of appeals then correctly applied that well-established proposition to the challenged instruction in this case, concluding that "the aiding and abetting instruction, considered as a whole, adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting." *Id.* at 39a. This Court has followed precisely the same analysis in numerous cases, including *Cupp* itself, concluding that instructions were not erroneous after examining them in their entirety. See *Cupp*, 414 U.S. at 148-150; *e.g.*, *Jones*, 527 U.S. at 391-395; *Victor* v. *Nebraska*, 511 U.S. 1, 1–17, 19-23 (1994).

As petitioner notes (Pet. 20-21), *Cupp* and other decisions of the Court, such as *Park*, also indicate that other aspects of the trial may sometimes be relevant in evaluating whether instructions adequately informed the jury of the applicable law. For example, as the Court explained in *Park*, "[o]ften isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the *trial*." 421 U.S. at 674-675 (citation omitted). Petitioner is incorrect in contending, however, that the court below rejected that proposition or held that a reviewing court may consider only the instructions themselves in assessing their validity. On the contrary, the court of appeals considered petitioner's argument that the instructions here were rendered unclear by the prosecu-

tor's summation. See Pet. App. 37a-38a. Although the court rejected that argument, the court did not do so on the ground that only the instructions themselves are relevant in assessing whether they may have misled the jury. Instead, the court "agree[d]" with petitioner "that a party's summation can heighten the *already present risk* that an erroneous jury instruction may mislead the jury." *Id.* at 38a. But the court concluded that situation was not present here because the instructions in this case "were *clear* that [petitioner] could not be convicted solely because he knew of [his wife's] crimes or acquiesced in her actions, without acting himself." *Ibid.* (emphasis added); see *ibid.* (stressing that the instructions "*clearly* apprised the jury of what it was required to find in order to convict" (emphasis added)). Given the clarity of the instructions, the court concluded that any possible misstatement of the law in the government's summation, to which petitioner did not object at trial, did not render the instructions misleading. *Ibid.*

Petitioner does not identify any decision of this Court or another court of appeals that conflicts with that analysis. In *Cupp*, the Court considered only the jury instructions themselves in rejecting the contention that they were erroneous. 414 U.S. at 148-150. And, in *Park*, although the Court also reviewed the trial evidence and the prosecutor's summation, the Court's review confirmed its conclusion that the instructions, viewed as a whole, fairly advised the jury of the applicable law. 421 U.S. at 674-676.

The court of appeals decisions cited by petitioner (Pet. 21-23) likewise do not conflict with the ruling of the court below that any misstatement in the prosecutor's summation did not render misleading the district court's otherwise clear instructions. The decision on which peti-

tioner primarily relies, *United States* v. *Bailey*, 405 F.3d 102 (1st Cir. 2005), is entirely in accord with the decision below. In *Bailey*, the defendant challenged the same aiding-and-abetting instruction at issue in the present case. *Id.* at 110. Like petitioner here, the defendant in *Bailey* argued that the willfulness component of the instruction erroneously permitted the jury to find him guilty under a failure-to-act theory. *Ibid.* And, like the Second Circuit here, the First Circuit concluded that, when the willfulness instruction was considered in the context of the entire aiding-and-abetting instruction, it was "highly unlikely" that the instruction "misled the jury to believe that it could convict" the defendant under a failure-to-act theory. *Ibid.* The First Circuit noted that the challenged language, although "extraneous" to the case, was not substantively incorrect and was, in fact, a standard willfulness definition regularly employed by federal courts. *Id.* at 110-111 & n.4 (collecting cases). Moreover, the First Circuit explained that a "clarifying instruction that immediately followed" the challenged willfulness language, identical to an instruction given in this case (see Pet. App. 134a; p. 9, *supra*), "properly safeguarded against any misapplication of the failure-to-act instruction." *Bailey*, 405 F.3d at 110-111.[4]

The other court of appeals decisions cited by petitioner simply state the general proposition that the va-

[4] Contrary to petitioner's contention (Pet. 22-23), the First Circuit in *Bailey* did not uphold the aiding-and-abetting instruction based on the fact that the government had not pursued a failure-to-act theory. The court noted that fact only in explaining why the failure-to-act language was "extraneous." 405 F.3d at 110. The court's conclusion that the challenged instruction was not erroneous rested on the fact that the willfulness language was made "in the context of an otherwise correct seven-paragraph instruction" and was coupled with "a clarifying instruction that immediately followed" the challenged instruction. *Ibid.*

lidity of jury instructions should be evaluated in light of the entire trial record. As discussed above, the court below did not dispute that proposition. Indeed, the Second Circuit has affirmed the validity of the proposition in numerous cases. See, *e.g.*, *United States* v. *Quinones*, 511 F.3d 289, 314 (2007) (noting that statements in instructions that may seem prejudicial on their face may be unproblematic "when viewed in the context of the entire record of the trial" (citation omitted)), cert. denied, 129 S. Ct. 252 (2008); *Chalmers* v. *Mitchell*, 73 F.3d 1262, 1269 (stating that a court "must view the challenged portions of the instruction in the context of the whole trial as observed by the jury"), cert. denied, 519 U.S. 834 (1996); *United States* v. *Torres*, 901 F.2d 205, 240 (explaining that "in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial" (citing *Park*, 421 U.S. at 674)), cert. denied, 498 U.S. 906 (1990); *United States* v. *Birnbaum*, 373 F.2d 250, 257 (1967) ("In evaluating the instructions to the jury, not only must each statement made by the judge be examined in light of the entire charge, but the charge itself can only be viewed as part of the total trial."). Petitioner's disagreement with how the court of appeals applied that settled rule to the facts of this case does not warrant this Court's review.[5]

[5] Although petitioner asserts (Pet. 24-25 & n.8) that a finding of instructional error would require reversal of not only the substantive counts of conviction but also the conspiracy counts and the forfeiture order, that assertion is incorrect. The aiding-and-abetting instructions applied only to the substantive counts, and petitioner has not challenged the conspiracy instructions, which did not permit the jury to find him guilty based on a failure to act. See 12/11/07 Tr. 5039-5055. Petitioner's reliance (Pet. 24) on *Parr* v. *United States*, 363 U.S. 370 (1960), is misplaced. In that case, the Court held that the conduct the defendants conspired to commit was not in fact a federal crime. See *id.* at 373-394.

3. Petitioner also contends (Pet. 25-29) that, if the Court grants review to address the validity of the aiding-and-abetting instructions, the Court should also grant review on a second question—whether a defendant may be found guilty of aiding and abetting based on a failure to act "where no law establishes a duty to act." Pet. i. Because the question of the validity of the aiding-and-abetting instructions does not warrant this Court's review, the Court should also deny review on petitioner's second question. Moreover, regardless of how this Court disposes of the first question, the second question does not warrant this Court's review.

The second question is not actually presented by this case. As the petition concedes, the court below did not address the question. See Pet. App. 34a (stating that "[w]e need not decide the question whether in the circumstances of this case [petitioner] could properly be convicted based upon an omission to act"); Pet. 25 (acknowledging that the court "skirted" the issue). Moreover, however one reads the jury instructions, they did not permit the jury to find petitioner guilty of aiding and abetting for failing to act "where no law establishes a

---

Here, in contrast, a finding that the aiding-and-abetting instructions were erroneous would not establish that the conduct petitioner conspired to commit was not a federal crime. Petitioner's "spillover" argument (Pet. 25) also lacks merit, because all of the evidence introduced at his trial was relevant and admissible to establish his participation in the alleged conspiracy and his role in the substantive offenses, either as a principal or as an aider and abettor based on affirmative action. The fact that petitioner's conspiracy convictions would not be affected by a ruling in his favor is an independent reason for this Court to deny review, because any decision by the Court would have no effect on his term of imprisonment. See p. 7, *supra* (explaining that petitioner received concurrent sentences of 40 months of imprisonment on each count of conviction, including the conspiracy counts).

duty to act." Pet. i. Even if the willfulness language i considered in isolation, the instructions permitted th jury to find willfulness based on a failure to act only i the jury found that petitioner specifically intended "t fail to do *something the law requires to be done*." Pet App. 134a (emphasis added). The government's summa tion did not introduce any ambiguity about the require ment of a legal duty to act. On the contrary, the prose cutor stated that the jury had to find "[a] failure to ac with specific intent, to fail to do *something the law re quires*." *Id.* at 38a (emphasis added).

Even if the question were properly presented, i would not warrant this Court's review. Petitioner doe not allege a conflict among the courts of appeals on th issue. And, despite his contention (Pet. 30) that the gen eral issue of aiding-and-abetting arises frequently i federal prosecutions, petitioner does not (and could not claim that there is a significant number of cases in whic the government pursues aiding-and-abetting liabilit based on a failure to act in the absence of any legal duty Under those circumstances, this Court's review of th second question raised by petitioner is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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DECEMBER 2010

Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-475

IN THE
Supreme Court of the United States

MAHENDER MURLIDHAR SABHNANI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The trial judge, the prosecutor, and defense counsel in this case *all* understood that petitioner was on trial for aiding and abetting his wife Varsha. Each also understood that the government's main theory as to petitioner was that he failed to intervene to halt his wife's abuse of two domestic servants. As far as the government was concerned, it could ask the jury to convict because human decency alone (apart from any external, independent legal duty) should have impelled petitioner to intervene. The Second Circuit rightly concluded that this theory of aiding-and-abetting is "dubious," and even the Solicitor General now concedes that the omissions theory could only be rendered correct by additional instructions that defined the source and scope of a legal duty to act—instructions that petitioner insisted were necessary. Yet, like the Second Circuit, the Solicitor General defends the convictions on the basis that the jury also received an *alternative* theory of aiding and abetting that was correct, even though this was not even the theory that the prosecutor primarily argued to the jury. This is flatly contrary to this Court's cases.

The issue here is not, as the Solicitor General would have it, whether jury instructions must be read as a whole. No one disagrees with that proposition, which in this case hurts rather than helps the government. The instructions "as a whole" show a classic error under *Yates v. United States*, 354 U.S. 298 (1957): the jury was given *alternative* theories to convict (affirmative acts *or* omissions) and one of those theories (omissions) is legally erroneous. The government must prove that this error is harmless

beyond a reasonable doubt on the basis of the entire record. *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010) (citing *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam)). The government has never suggested it can do so. Its argument instead is that the *alternative* instruction on affirmative acts was really, truly, honestly, cross-my-heart correct. This is a statement of the *Yates* problem, not its solution. The government's argument therefore rests not on the instructions "as a whole," but on the instructions as a half, and it depends ultimately on the proposition that the jurors were the only people in the courtroom who did not get wind of the government's primary theory of prosecution.

Because the jury was expressly permitted to convict on a theory that even the government now concedes was at least incomplete, the fact that they also had an alternative that was correct could only help the government if "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). But petitioner's convictions were affirmed without any reason to think the jury that heard the case actually found him guilty under the correct legal theory. This violates both due process and the Sixth Amendment. The error is particularly pernicious in this case, because the jury most likely convicted on the invalid theory presented by the instructions and the prosecutor's arguments, which essentially defined a common-law crime that left the key question of duty up to the individual sensibilities of the jurors. The decision below gives prosecutors and juries license to do something prohibited by 200 years of precedent: invent common law federal crimes. *See, e.g.*, *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

THIS COURT'S REVIEW IS NEEDED TO SAFEGUARD EXCEEDINGLY IMPORTANT REQUIREMENTS FOR HARMLESS-ERROR REVIEW AND AIDING-AND-ABETTING LIABILITY

1. The Solicitor General devotes the bulk of his brief to a detailed defense of the aiding-and-abetting instruction that was based on affirmative actions, but he can scarcely deny that the government deliberately built its case on a second theory under which petitioner could be found guilty of violating at least four separate federal laws because of *inactions*—*i.e.*, he did not intervene in his wife's abuse of domestic servants. It was the prosecutors' mantra from beginning to end that petitioner "had to know" what was happening, yet "didn't do anything" about it. *E.g.*, Pet. App. 127a-30a. Thus, after presenting proofs devoted to highlighting petitioner's inaction, the government requested an instruction tailored to those proofs, successfully fought off petitioner's strong objection to it during the Rule 30 charge conference, and urged the jury in summation to convict petitioner on that basis by itself. *Id.* at 121a-31a. None of this is disputed.

The government put nearly every egg in its failure-to-act basket because, as the Solicitor General's response makes clear, the evidence for inferring that petitioner *did* anything unlawful was paper-thin and vigorously contested. According to the two workers themselves (*see* Pet. 4), petitioner wasn't even present for the abuse they described, much less did he actively participate. Even the evidence of "acts" that the government now trots out—for example, "order[ing the women] to undertake various tasks" such as "cleaning the bathroom in his office" (Opp. 3)—

does little to suggest illegality, and it is scarcely surprising given that he believed his wife had hired them for domestic service. The government is therefore reduced to relying on a vaguely worded statement in the trial judge's sufficiency of evidence ruling—a source that is all the more curious given the judge's *ultimate* conclusion that "the jury found that [petitioner] aided and abetted in these crimes, *though he was not a participant at all*." Pet. App. 137a (emphasis added). To be sure, the trial court believed that the government also presented evidence of affirmative acts, but there is a world of difference between the judge's post-trial declaration that "this is *not only* a failure to act case" (Pet. App. 116a (emphasis added)), and the government's current litigating position that it was not a failure-to-act case *at all*.[1]

2. Calling the instructions "correct as a whole" cannot disguise the panel's sharp departure from this Court's precedents. The problem here is not one of ambiguity that was "clarified" by additional instructions. In particular, although the government makes much of instructions that focused on whether petitioner "participated" or "associate[ed]" himself in the venture (Opp. 6), these merely tracked the first paragraph of the aiding-and-abetting instructions and left untouched the key following paragraph, which told the jury that willful "participation" could

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[1] Indeed, the government's reliance on this ruling is puzzling because a court considering evidentiary sufficiency is concerned only with whether a properly instructed jury *could* rationally have convicted on the evidence presented. The problem here is that the jury was *not* properly instructed, which means the government must demonstrate that the jury *did* find guilt under a proper theory, not merely that it could have.

take the form of a failure to act when there was some undefined duty to do so. *See* Opp. 5; Pet. App. 134a-35a. As far as the jury knew, this omissions theory was a fully adequate basis for conviction.

The government can only defend the failure-to-act instruction by emphasizing the complete *absence* of the language needed to make it correct. This odd defense—under which the very error alleged turns out to be the basis for affirmance—posits that the jury could avoid "'any confusion'" (Opp. 13 (quoting Pet. App. 37a)) about this instruction by simply ignoring it. *See also* Pet. App. 33a-34a (panel calls instruction "not inaccurate," "but simply extraneous" because the *additional* instruction stating which legal theory might possibly support failure-to-act liability was "absent"). But "the crucial assumption underlying our constitutional system of trial by jury" is that "jurors carefully follow instructions," not ignore them. *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985). That assumption almost invariably redounds to the government's benefit. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200 (1987) (citing cases). This is hardly the occasion to start assuming—contrary to settled law—that jurors instead follow only the instructions that happen to be correct. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("Jurors are generally not equipped to determine whether a particular theory of conviction submitted to them is contrary to law."). In fact, one of the first things this jury heard after summations was: "You must follow all of the rules as I explain them to you. You may not follow some and ignore others." Trial Tr. 4994; *id.* (adding not to ignore any

parts, "[e]ven if you disagree or *don't understand* the reasons for some of the rules" (emphasis added)).[2]

The absence of further instructions defining duty was not some word-processing accident but the result of the government's strategy of intentionally withholding such instructions from the jury. As the government then saw it, the existence or contours of any duty was "a matter of law and not an issue that would be presented to the jury for resolution." Pet. App. 153a (also arguing that it was "not a factual issue" for which "the jury would have to render a verdict"). Of course, withholding elements of a crime from the jury is a textbook example of constitutional error. *See, e.g., Neder v. United States*, 527 U.S. 1, 10 (1999); *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). Here, it allowed the jurors to believe that they had been given everything needed to convict for failing to act—a result that invited each juror to act on his or her individualized sense of moral outrage and violated over 200 years of precedent barring common law federal crimes. *See, e.g., Hudson, supra.*

The Second Circuit resolved these issues by emphasizing what no one disputes—that the jury *also* received a correct affirmative-acts instruction. As this court held in *Pulido*, this *could* allow the government to retain the conviction, but only by satisfy-

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[2] Calling the instruction literally "not inaccurate" makes a difference only if jurors know they can ignore a judge's decision to instruct them on the government's primary theory. Other circuits reject that proposition, recognizing that "even a facially correct instruction may, in the light of record proof" and "other circumstances of the case, be incomplete, misleading, confusing, or otherwise prejudicial." *United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004).

ing the *Chapman* standard—*i.e.*, by showing, beyond a reasonable doubt, that *this* jury convicted on the proper basis. The Second Circuit did not do that; instead, it engaged in a truncated prejudice analysis that ignored the trial record and asked the wrong question. The court did not inquire whether the faulty instructions were "so confusing as to permit" *petitioner's* jury to convict for failure to act (Pet. App. 34a), but whether the instructions could have misled an imaginary jury that heard evidence and arguments *exclusively* devoted to aiding and abetting by affirmative acts. It thus affirmed the convictions even though there is no reason to think the jury that actually heard the case found petitioner guilty on a proper basis. An unbroken line of Sixth Amendment precedent bars appellate courts from upholding convictions on the supposition that a properly instructed jury could have (or even would have) reached the same verdict. *See California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia & Ginsburg, JJ., concurring) (error "cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise," because "[t]o allow the error to be cured in that fashion would be to dispense with trial by jury"); *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("the error in such a case is that the wrong entity judged the defendant guilty"); *Chapman v. California*, 386 U.S. 18, 25-26 (1967).

3. The more fundamental point is that speculation about the likelihood that jurors rejected a part of their instructions as superfluous can only be considered (if ever) as *a part* of—not *in place* of—traditional harmless error review. To be sure, a juror *could* have thought it plausible that the judge mistakenly said (and then repeated) that failures to act give rise to the *same* liability as affirmative acts,

when he really meant that only affirmative acts are unlawful. But in the eyes of a conscientious juror, the judge also could have meant that failure-to-act may take the place of "action" in the instructions. At least that way, a juror wouldn't run afoul of the one directive that applied to *the entirety* of her instructions: do not "follow some" instructions "and ignore others." And, not coincidentally, it would explain why the prosecutors spent so much time in summation emphasizing how the jury should use all of their failure-to-act proofs to convict petitioner. Pet. App. 127a-30a (emphasizing "he didn't do anything").[3]

Compounding the error of importing the prejudice assessment into its determination whether the instructions had the capacity to mislead, the appellate court artificially excluded from *that* inquiry everything else that demonstrated why the instruction surely did adversely affect the verdict. The government points to no other case where the prejudice from an instruction that never should have been given was assessed by completely ignoring that all participants (judge, prosecutor, and defense counsel) clearly understood at the time the instruction was given that the jury could use it as a separate and independent reason to convict. In the government's

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[3] The summation also expressly linked the failure-to-act theory to the conspiracy counts, dashing any possibility that the government might establish, beyond a reasonable doubt, that the instructional error had no adverse effect on those counts. *See* Pet. App. 130a-31a (arguing from failure-to-act evidence that petitioner "is just as responsible as [his wife] is for all of her actions" "under the law of conspiracy, and under the law of aiding and abetting"). As the prosecutor undoubtedly recognized, jurors are much more likely to convict of *conspiring* to violate a statute if they have already been misled into a rendering a guilty verdict for *violating* the statute.

game of "heads-we-win, tails-you-lose," only if the prosecutors "did *not* proceed on a failure-to-act theory" could the manner in which they actually tried the case figure into the determination whether the jurors undoubtedly realized that "the court's instruction on that point was extraneous." *See United States v. Bailey*, 405 F.3d 102, 110 (1st Cir. 2005) (emphasis added).

Not content with a rule that would shift away from the government its *burden* to disprove prejudice from the error it created, *cf. Gamache v. California*, No. 10-5196 (U.S. Nov. 29, 2010) (Sotomayor, J., concurring in certiorari denial) (emphasizing that lower courts must place the burden on the prosecution), the Solicitor General urges this Court to shift the *blame* for any prejudice to petitioner, who assertedly could have fixed things by objecting when the prosecutor urged conviction under the flawed theory. Opp. 10, 14, 16. But the error is not that the government argued for something the instructions did not allow; rather, it is that the judge had already ruled that the government *could* argue its primary theory without fear of defense opposition. The very purpose of the Rule 30 charge conference is to determine what may be argued *without* drawing an objection. *See, e.g., United States v. Pelullo*, 964 F.2d 193, 220 (3d Cir. 1992) (explaining that Rule 30, Fed. R. Crim. P., "require[s] the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury" (internal quotation marks omitted)). By overruling petitioner's objections to the failure-to-act instruction during that conference, the judge put petitioner on notice that he better be prepared to defend under *both* the affirmative-act *and* failure-to-act theories if he wanted to "intelligently argue the case to the

jury." *Id.* (internal quotation marks omitted). Petitioner was under no duty to magnify the instructional error by asking the judge to repeat during summation that petitioner could be convicted if the jury found he "stayed" in his house and "failed to do anything." Pet. App. 122a.[4]

4. This Court should grant review of both questions. The government says the second question is "not actually presented" (Opp. 19-20) because the Second Circuit refused to address it, and because the instruction told the jury that some kind of duty was required. This is a description of the error, not a reason to deny review. Because no legal duty applied *in this case* (the Second Circuit having rejected those that the government proffered), it was error to give the instruction. It is of no consequence that other cases might arise in which an omissions instruction, coupled with a charge that does define a real duty, would be proper.

The government never denies that the instruction common to the two questions comes from the leading jury-instruction treatise, concedes that the circuits addressing this issue have given weight to the instruction's pedigree when rejecting challenges based on the same failure-to-act language, and makes no effort to identify a federal criminal statute that prosecutors employ nearly as often as aiding-and-abetting. To be sure, only the government can

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[4] While it may be literally true that the court of appeals "considered" the possibility that the prosecutor's summation helped mislead the jury into convicting for failure to act (Opp. 15), the court's ruling that those failure-to-act arguments would receive no weight at all is not the type of consideration demanded by the Sixth Amendment. Pet. App. 38a (stating there was no "risk" for the summation to "heighten").

say whether there will be "a significant number of cases in which the government pursues aiding-and-abetting liability based on a failure to act in the absence of any legal duty." Opp. 20. But far from trying to assure the Court that this improper practice will come to an end (*cf.* Brief for the United States in Opposition at 5, *Tapia v. United States*, No. 10-5400 (U.S. Oct. 2010) (opposing review because "the government is in the process of informing" the appellate courts that it agrees with the petitioner's legal position)), the Solicitor General gives every reason to believe that future petitions challenging unlawful failure-to-act convictions will be greeted with its same "move along, nothing to see here" response.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 23, 2010